Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Effective July 3, 1997, Congress amended the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, to provide, *inter alia*, that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997). The accompanying House Report states that Congress so amended the Act to correct the Fifth Circuit's April 9, 1997, decision in this case, which, in the eyes of Congress, "indicates that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). Citing *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), the House Report also states Congress' intention that "[a] defendant unsuccessful in obtaining dismissal or summary judgment based on the immunity granted" by the amended Act "will have the right to interlocutory appeal of that ruling." *Id.* at 5. Petitioners present three questions for consideration in light of this legislative reaction to the Fifth Circuit's decision:

1. Whether Congress' July 3, 1997, amendment of the Charitable Gift Annuity Antitrust Relief Act of 1995 requires this Court to reverse under *Schooner Peggy* and its progeny the Fifth Circuit's April 9, 1997, decision upholding the District Court's refusal to dismiss Respondent's claim that Petitioners violated the Sherman Act by "conspir[ing] to fix the rates of return on charitable gift annuities"?

2. Whether the Fifth Circuit's holding that it lacked jurisdiction to review the District Court's refusal to dismiss Respondent's antitrust claim conflicts with this Court's decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*, which hold that the denial of a motion to dismiss asserting an immunity from suit is immediately appealable where, as here, the defendants-appellants argue on appeal that the district court's denial of their motion to dismiss was based on an error of law concerning the scope of the asserted immunity?

3. Whether the Fifth Circuit abused its discretion under FED. R. APP. P. 38 by imposing sanctions against Petitioners for immediately appealing the District Court's denial of their motion to dismiss Respondent's antitrust claim?

PARTIES TO THE PROCEEDING

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago, American Leprosy Missions, Inc., Southern Baptist Convention, General Conference Corporation of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., Good Shepherd Home Foundation, American Baptist Foundation, American Baptist Foreign Mission Society, and The Evangelical Lutheran Church in America. Petitioners were Defendants-Appellants in the Court of Appeals. Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other parties to the proceedings in the Court of Appeals were Defendants-Appellants The American Council on Gift Annuities, Inc., individually and as successor to the Committee on Gift Annuities, an unincorporated association, The Lutheran Church-Missouri Synod, The Texas District of the Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, Gray, Plant, Mooty, Mooty & Bennett, Anderson University, Inc. d/b/a Anderson University, United Church of Christ, Mount Holyoke College, Northwestern University, Smith College, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, Planned Giving Services, Inc., d/b/a Planned Giving Services, Hay/Huggins Company, Inc., Prerau & Teitell, Vassar College, St. Olaf College, Wittenberg University, and Appellant Dan Morales, as Attorney General of the State of Texas.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners has any parent or subsidiary companies.

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Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the Court deems argument of this case to be unnecessary, Petitioners request that the Court grant the writ and summarily reverse the judgment of the Court of Appeals or, in the alternative, grant the writ, vacate the judgment below, and remand the case to the Fifth Circuit for reconsideration in light of Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997).

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-23a) is reported at 110 F.3d 1082. The opinion of the District Court (Pet. App. 24a-37a) is reported at 943 F. Supp. 685.

JURISDICTION

The Fifth Circuit entered judgment on April 9, 1997, and denied rehearing on May 21, 1997. Pet. App. 38a-40a, 41a-43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

This Petition involves the application of 28 U.S.C. § 1291, Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997), and FED. R. APP. P. 38, which are set forth at length at Pet. App. 47a-48a.

STATEMENT OF THE CASE

Effective December 8, 1995, Congress gave Petitioners a statutory immunity from Respondent's claim that

Petitioners violated the Sherman Act by conspiring to fix rates of return for charitable gift annuities. *See* Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, 109 Stat. 687 (1995). On April 19, 1997, the Fifth Circuit sanctioned Petitioners for immediately appealing the District Court's September 30, 1996, order refusing to dismiss Respondent's antitrust claim as Congress intended.

Effective July 3, 1997, Congress amended the Charitable Gift Annuity Antitrust Relief Act of 1995 to provide, *inter alia*, that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997).

Petitioners respectfully submit that the July 3, 1997, amendments to the Charitable Gift Annuity Antitrust Relief Act of 1995 vindicate their appeal of the District Court's September 30, 1996, order and confirm that the Fifth Circuit's imposition of sanctions was an abuse of discretion. Accordingly, Petitioners respectfully ask this Court to grant certiorari and reverse the Fifth Circuit's judgment. In the alternative, Petitioners request an order granting the writ, vacating the judgment below, and remanding the case for reconsideration in light of the new legislation.

A. Charitable Gift Annuities.

The House Report accompanying the July 3, 1997, amendments to the Antitrust Relief Act succinctly describes charitable gift annuities and the role of the American Council on Gift Annuities, Inc., ("the Council") in developing suggested rates of return for charitable gift annuities:

Charitable gift annuities and charitable remainder trusts are fundraising instruments defined and regulated under sections 501(m)(5) and 664(d) of the Internal Revenue Code. A person who enters into a gift annuity or charitable remainder trust agreement with a religious, charitable or educational institution makes a gift to the institution and receives a fixed income for life. Since the value of the gift received is more than the property transferred to the donor, a bargain sale has occurred, and the difference in values is deductible to the donor. *See* 26 U.S.C. § 1011(b).

The annuity rate applied to the value of the gift is the critical element in ensuring that the transaction will result in a meaningful gift to the charity. The American Council on Gift Annuities, a non-profit organization representing more than 1,500 charitable organizations and institutions, provides technical assistance to its members in determining appropriate annuity rates. The rates recommended by the Council are based on actuarial studies of mortality experience among annuitants and a conservative projection of the rate of income to be earned on invested reserve funds. They are computed to produce an average "residuum" or gift to the organization of between 40 and 60 percent of the amount originally donated under the agreement. Consequently, the rates are lower than and are not in competition with any rates offered commercially.

H.R. Rep. No. 146 at 2. The House Report notes that the Council promotes the use of its rates for two reasons: (1) "it protects the fiscal integrity of the charity," and (2) "it ensures that donative intent rather than financial gain motivates the choice of recipient." *Ibid.* Petitioners, who are sponsors of the Council, issue charitable gift annuities.

B. Proceedings and Disposition Below.

In December 1994, Dorothy Ozee, the predecessor in interest to Respondent Boyd L. Richie, filed this action in the United States District Court for the Northern District of Texas, Wichita Falls Division, invoking federal-question jurisdiction under 28 U.S.C. §§ 1331 & 1337 and seeking, *inter alia*, treble damages under Section 1 of the Sherman Act, 15 U.S.C. § 1. Ozee, then Richie, claimed that the alleged practice of Petitioners and other sponsors of the American Council on Charitable Gift Annuities, Inc., of setting uniform rates of return for charitable gift annuities defined by 26 U.S.C. § 501(m)(5) constitutes a horizontal price-fixing agreement that is *per se* unlawful under Section 1. Thus, Respondent has alleged that Petitioners and others "entered into contracts, combinations, and conspiracies to fix the rates of return on charitable gift annuities and methods for calculating such returns," that "[t]he purpose, intent, and effect of such agreements [was] to fix rates of return on charitable gift annuities," and that such alleged conduct "constitutes a *per se* violation of section one of the Sherman Act, 15 U.S.C. § 1." Pet. App. 80a-81a.

In response to Respondent's antitrust allegations, Congress unanimously enacted the Charitable Gift Annuity Antitrust Relief Act of 1995 ("the Antitrust Relief Act"). As originally enacted, the Antitrust Relief Act provided that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of title 26 that are exempt from taxation under section 501(a) of title 26 to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." 15 U.S.C. § 37 (Supp. 1995). As the House Report confirms, Congress specifically intended the Antitrust Relief Act to immunize from Sherman Act scrutiny the alleged price-fixing agreement challenged in this action:

> Charitable giving through gift annuities is threatened by a lawsuit currently pending in the United States District Court for the Northern

District of Texas. *Richie v. American Council on Gift Annuities* (Civ. No. 7:94-CV-128-X) . . . .

> The ongoing litigation is causing charities to expend massive amounts of time and resources on defending their positions. It is also forcing these organizations to make public information about their donors, a fact which makes people who guard their privacy reluctant to give. Regardless of the outcome of the suit, it has already had and will continue to have a chilling effect on gift giving and . . . is consuming financial resources which would otherwise be allocated to charitable missions.
>
> * * *
>
> Enactment of H.R. 2525 will provide a complete defense to the antitrust portions of *Richie*, as well as protection from future suits based on the use of agreed-upon annuity rates.

H.R. Rep. No. 336, 104th Cong., 1st Sess., at 2-4 (1995).

Upon enactment of the Antitrust Relief Act, Petitioners and other defendant charities moved promptly to dismiss Respondent's Sherman Act claim. In response, Respondent moved to file a Fourth Amended Class Action Complaint alleging that some of the participants in the alleged rate-setting agreement are not entities "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" within the meaning of the Antitrust Relief Act. Relying on the discredited reasoning of the Ninth Circuit in *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), *rev'd sub nom., Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993), Respondent argued that the Act did not bar a Section 1 claim alleging a "hybrid" conspiracy among "exempt" and "non-exempt" entities.

In reply, Petitioners argued that Respondent's attempt to evade dismissal by challenging various charities' 501(c)(3) statuses was futile. First, Petitioners argued that Congress used the language "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" as a traditional

shorthand reference to 501(c)(3) organizations -- not as a factual element of the exemption granted by the Antitrust Relief Act.[1] Second, Petitioners argued that the Act's legislative history revealed a specific congressional intent to immunize non-501(c)(3) entities from antitrust liability for assisting charities in setting rates for charitable gift annuities. Third, Petitioners argued that the District Court lacked jurisdiction to review the IRS' prior determinations of the defendant charities' respective 501(c)(3) statuses. Fourth, Petitioners argued that Respondent's reading of the Act to leave so-called "hybrid" conspiracies subject to antitrust scrutiny ignored fundamental antitrust principles this Court set forth in *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993).

On September 30, 1996, the District Court granted Respondent leave to file his Fourth Amended Complaint and denied Petitioners' motion to dismiss. The District Court held that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the Antitrust Relief Act was not merely a shorthand reference to recognized 501(c)(3) organizations but a factual element of the antitrust exemption granted by the Act. Further, the District Court held that, regardless of prior IRS determinations of charities' respective tax-exempt statuses, the Act's protections were available only to charities proven in court to be "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" and that any defendant proven to be so described and so exempt would nevertheless lose the Act's protection if it were found to have participated in a rate-setting agreement with a "non-exempt" entity. Thus, the District Court concluded that

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[1]Petitioners cited to the District Court twenty-two federal statutes (other than the Internal Revenue Code) and thirty federal regulations (other than tax regulations) that similarly define or refer to charities as organizations that are both "described in section 501(c)(3)" and "exempt from taxation under section 501(a)." To Petitioners' knowledge, none of those statutes or regulations contemplates a fact finding by any court or any administrative agency other than the IRS.

each defendant seeking to invoke the Act's protection must plead and prove (i) that it was "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" ***and*** (ii) that every entity with whom it allegedly conspired also was so described and so exempt. Accordingly, the District Court refused to dismiss Respondent's antitrust claim. Pet. App. at 27a-32a.

Petitioners, whose respective tax-exempt statuses have never been challenged, timely appealed under the *Cohen* doctrine the District Court's conclusions that Petitioners had the burden to plead and prove the applicability of the Antitrust Relief Act and that each defendant's immunity from suit under the Act turned on in-court proof of the tax-exempt status of each and every alleged conspirator.

After a motions panel expedited Petitioners' appeal, the District Court sent a letter to the Fifth Circuit stating: "I wrote [in the September 30 Order] that there is an issue of whether an exempt entity conspiring with a non-exempt entity would . . . vitiate the exemption. That issue was not squarely before me, but at first blush the plaintiffs' position seemed correct. ***After reading more cases and further consideration of the arguments I would now say I am not so sure of the plaintiffs' position.***" Pet. App. at 110a (emphasis added).

Notwithstanding the District Court's equivocation on the "hybrid" conspiracy question, the Fifth Circuit -- without addressing the District Court's conclusion that Petitioners had the burden to plead and prove the applicability of the Act -- affirmed the September 30 Order and imposed monetary sanctions against Petitioners under FED. R. APP. P. 38. Pet. App. at 7a-11a, 21a-22a. Despite Petitioners' well founded arguments based on the language, structure and history of the Antitrust Relief Act, including those made in a separate reply brief devoted entirely to the "hybrid" conspiracy issue, *see id.* at 83a-104a, the Court of Appeals held that Petitioners' counsel had failed to "come to grips" with Respondent's allegation of a "hybrid" conspiracy among "exempt" and "non-exempt" entities. *Id.* at 21a-22a.

On May 21, 1997, the Fifth Circuit declined to rehear Petitioners' appeal. On June 11, 1997, the Court of Appeals denied Petitioners' motion to stay its mandate pending disposition of a petition for a writ of certiorari. On June 19, 1997, Justice Scalia denied Petitioners' application to recall the Fifth Circuit's mandate pending certiorari.

On July 3, 1997, just two weeks after Justice Scalia denied Petitioners' application, President Clinton signed into law the Charitable Donation Antitrust Immunity Act of 1997 ("the Immunity Act"), Pub.L. No. 105-26, 111 Stat. 241 (1997). The Immunity Act amended Section 2 of the Antitrust Relief Act, 15 U.S.C. § 37, to provide that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct." Pub.L. No. 105-26, 111 Stat. 241 (1997). Section 3 of the Immunity Act provides that the "Act, and the amendments made by th[e] Act, shall apply with respect to all conduct occurring before, on, or after the date of the enactment of th[e] Act and shall apply in all administrative and judicial actions pending on or commenced after the date of the enactment of th[e] Act," July 3, 1997. *Id.*

The House Report accompanying the unanimously adopted Immunity Act states that Congress swiftly amended the Antitrust Relief Act because the Fifth Circuit had misinterpreted the Antitrust Relief Act and failed to implement Congress' legislative intent:

> Charitable giving through gift annuities and charitable trusts continues to be threatened by a lawsuit currently pending in the United States District Court for the Northern District of Texas.

Richie v. American Council on Gift Annuities, Inc. (Civ. No. 7:94-CV-128-X). . . .

In recognition of the potential impact of this litigation on charitable giving, Congress enacted (by a vote of 427-0 in the House, and by voice vote in the Senate) the "Charitable Gift Annuity Antitrust Relief Act of 1995" (15 U.S.C. § 37, *et seq.*) . . . .

Enactment of the 1995 Act was anticipated to provide a complete defense to the antitrust portions of *Richie*, as well as protection from future suits based on the use of agreed-upon annuity rates. Unfortunately, that has not proven to be the case. A recent decision by the United States Court of Appeals for the Fifth Circuit, *Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082 (5th Cir. 1997), upheld the denial of a motion to dismiss based on an assertion of the new antitrust exemption. This decision, and the ruling of the District Court, indicates that the Charitable Gift Annuity Antitrust Relief Act of 1995 is not being interpreted as broadly as it was intended by Congress.

[The Immunity Act] replaces current law with language drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act. Enactment of the [Immunity] Act is intended to obviate the need for further litigation over the antitrust portions of the *Richie* case, in that it extends complete immunity to all defendants being sued for participation in the issuance of a charitable gift annuity or charitable remainder trust.

H.R. Rep. No. 146, 105th Cong., 1st Sess., at 2-3 (1997).

REASONS TO GRANT THE WRIT

Petitioners respectfully submit that the Fifth Circuit's decision would merit this Court's review even if Congress had not amended the Antitrust Relief Act to reject the Fifth

Circuit's reasoning. The Fifth Circuit's analysis of the 1995 version of the Act violated the first principle of statutory construction by ignoring Congress' manifest purpose in enacting the statute and by making each charity's immunity turn on an immaterial issue of fact having no antitrust significance. Further, the Court of Appeals' jurisdictional analysis conflicts with *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Finally, imposing sanctions in this case of first impression under the Antitrust Relief Act was a clear abuse of discretion.

Congress' speedy amendment of the Antitrust Relief Act to vindicate Petitioners' contentions on appeal confirms the propriety of review in this Court, as it demonstrates beyond question that the Fifth Circuit misconstrued the 1995 Act, that Petitioners' appeal was proper, that sanctions were not warranted, and that rescuing the nation's charities from wasteful antitrust litigation is a compelling federal interest warranting Congress' and this Court's careful attention.[2]

A. Congress' Speedy Amendment of the Antitrust Relief Act Justifies Review By Certiorari.

The Fifth Circuit ostensibly dismissed Petitioners' appeal for lack of jurisdiction, without reaching its merits.

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[2]Petitioners' failure to obtain a stay of the Fifth Circuit's mandate has required them to defend themselves in the District Court while seeking review in this Court. Thus, Petitioners recently moved in the District Court to dismiss Respondent's antitrust claim pursuant to the newly amended Act. As the District Court lacks this Court's authority and responsibility to vacate the Fifth Circuit's erroneous jurisdictional holding and unjust imposition of sanctions, however, the pendency of Petitioners' renewed motions to dismiss does not diminish the need for this Court's intervention by writ of certiorari. At the very least, this petition merits an order granting certiorari, vacating the Fifth Circuit's judgment, and remanding this case for reconsideration in light of the new legislation. Indeed, the apparent need for a stringent standard for imposing appellate sanctions in cases of first impression and the apparent need for guidance in applying the *Cohen* doctrine in cases involving claimed immunities from the antitrust laws easily justify granting the writ and setting this case for argument.

Pet. App. at 10a-11a, 23a. Indeed, the Court of Appeals cited lack of appellate jurisdiction as its reason for refusing to consider one of Petitioners' principal arguments for reversal. *Id.* at 11a. Nevertheless, the Fifth Circuit clearly issued a ruling on the merits of Petitioners' claim to immunity under the 1995 version of the Antitrust Relief Act:

> . . . [E]ven assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

Pet. App. at 9a.

In the wake of the Fifth Circuit's ruling that Petitioners "may not reap [the] benefits" of the Antitrust Relief Act, Congress quickly amended the Act to provide, *inter alia*, that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "***any person*** subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997) (emphasis added). Further, Congress directed that those amendments "shall apply with respect to all conduct occurring before, on, or after the date of the enactment of this Act and shall apply in all administrative and judicial actions pending on or commenced after" July 3, 1997, including this action. *Id.* This immediate and decisive legislative reaction justifies an equally immediate and

decisive judicial reaction. Accordingly, this Court should grant the writ and apply the new legislation to reverse the Fifth Circuit's judgment under the time-honored rule of *Schooner Peggy*.

1. Under *Schooner Peggy*, this Court Must Apply the 1997 Version of the Act.

As noted *supra* at 8-9, the House Report accompanying the July 3, 1997, amendments to the Antitrust Relief Act states that Congress enacted those amendments because the Fifth Circuit, in affirming the District Court's denial of Petitioners' motion to dismiss, had misinterpreted the Antitrust Relief Act. *See* H.R. Rep. No. 146 at 3. Congress' authority to correct misinterpretations of federal statutes through such retrospective legislation is beyond question:

> Congress . . . has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994); *see also Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

Also beyond question is this Court's duty to apply the law in effect when the Court renders its decision, even if that law differs from the law applied below:

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801) . . . Article III creates a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the

> department as a whole. It is the obligation of the last court that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, 1 Cranch, at 109.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 1457 (1995).

Under the rule of *Schooner Peggy*, this Court must apply retrospective legislation enacted during the pendency of an action, unless "'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 n. 14 (1974). Accordingly, this Court must review the Fifth Circuit's decision in this case under the 1997 version of the Antitrust Relief Act.

2. The 1997 Version of the Antitrust Relief Act Clearly Entitles Petitioners to Dismissal of Respondent's Antitrust Claims.

Congress' 1997 amendments to the Antitrust Relief Act require the dismissal of Respondent's antitrust claim.

First, Congress' amendment of the Act to provide in Section 2(a) that "the antitrust laws . . . shall not apply to charitable gift annuities" requires dismissal by removing from Sherman Act scrutiny all activities concerning charitable gift annuities. Under the new Section 2(a), an allegation of injury resulting from the plaintiff's "purchase" of a charitable gift annuity presents no more of a federal antitrust claim than an allegation of injury resulting from a slip on a banana peel. Thus, Respondent's claim that Petitioners unlawfully restrained trade by fixing rates of return for charitable gift annuities does not even implicate -- much less state a claim under -- the Sherman Act.

Second, Congress' amendment of the Act to provide in Section 2(b) that "any person subjected to any legal

proceeding . . . under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct" requires dismissal by immunizing Petitioners from Respondent's antitrust claim.

The gravamen of Respondent's antitrust claim is that Petitioners and others violated Section 1 of the Sherman Act by conspiring to establish and use uniform rates of return for charitable gift annuities. *See* Pet. App. at 51a-53a, 56a, 73a-81a. The plain language of Section 2(b) grants Petitioners an "immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such alleged] conduct . . . ." Pub. L. No. 105-26, § 2, 111 Stat. 241 (1997). Moreover, the accompanying House Report confirms that granting such an immunity is precisely what Congress intended. *See* H.R. Rep. No. 146 at 3 (stating that Immunity Act's amendment of Antitrust Relief Act "is intended to obviate the need for further litigation over the antitrust portions of the *Richie* case, in that it extends complete immunity to all defendants being sued for participation in the issuance of a charitable gift annuity or charitable remainder trust"). Thus, there is no question that Respondent's antitrust claim should be dismissed under Sections 2(a) and 2(b) for failure to state a claim on which relief can be granted.[3]

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[3]As demonstrated above, Sections 2(a) and 2(b) of the amended Act entitle Petitioners to judgment on Respondent's antitrust claim as pleaded. Section 2(c) of the 1997 Act prevents Respondent from avoiding dismissal by once again cleverly amending his pleading.

Under the new Section 2(c), a mere ***allegation*** of conduct arguably falling outside the scope of the immunity -- i.e., fixing the rate of return for unspecified "annuities" -- would not deprive charities of their right to obtain dismissal of antitrust claims challenging their immunized conduct involving charitable gift annuities. Thus, Section 2(c) provides

B. The Fifth Circuit's Jurisdictional Holding Conflicts with this Court's Decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*.

The Fifth Circuit's jurisdictional holding also merits the Court's review, as it directly conflicts with this Court's decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*, which hold that the denial of a motion to dismiss asserting an immunity from suit is immediately appealable where, as here, the defendants-appellants argue on appeal that the district court's order denying dismissal turns on an erroneous legal conclusion concerning the scope of immunity. *See Behrens*, 116 S. Ct. at 838-42; *Mitchell*, 472 U.S. at 524-30.

A defendant may not immediately appeal an order denying immunity where the defendant-appellant argues merely that the district court erred in concluding that the record is insufficient to establish beyond dispute a factual issue that the defendant-appellant concedes to be material to its asserted right to immunity. *See Behrens*, 116 S. Ct. at 842 (discussing *Johnson v. Jones*, 115 S. Ct. 2151, 2156-59 (1995)). On the other hand, a defendant may immediately

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that a charity sued for fixing the rate of return for unspecified "annuities" may obtain an immediate summary judgment by showing either (1) that the plaintiff treated the "annuities" at issue as charitable gift annuities in an IRS filing or (2) that the donee treated the "annuities" as a charitable gift annuities in a document provided to the donor. Pub. L. No. 105-26, § 2, 111 Stat. 241 (1997). Upon such a showing, Section 2(c) entitles the defendant to a ***conclusive*** presumption that the "annuities" at issue are "charitable gift annuities" within the meaning of the 1997 Act, unless the plaintiff proves that "there has been a final determination by the Internal Revenue Service that, for fraud or otherwise, the donor's annuity . . . did not qualify . . . as a charitable gift annuity . . . when created." *Id.* Absent such a showing by the plaintiff, Section 2(c) entitles the defendant to the immunity from suit conferred by Section 2(b).

The manifest purpose of Section 2(c) is to prevent artful pleading from depriving defendants of the immunity conferred by Section 2(b). It also removes any perceived need for federal courts to shoulder the IRS' burden of administering Sections 501(c) and 501(m) of the Internal Revenue Code. *See* H.R. Rep. No. 146 at 6.

appeal an order denying a motion to dismiss where the defendant-appellant argues that the district court erred in concluding that a disputed issue of fact is material to the defendant-appellant's asserted right to immunity. *See Behrens*, 116 S. Ct. at 839-40, 842; *Mitchell*, 472 U.S. at 524-30. Where the appellant challenges the district court's order denying immunity from suit on the ground that the district court erred as a matter of law by holding that a disputed but arguably immaterial issue of fact was material to the defendant-appellant's right to immunity, jurisdiction exists under the *Cohen* doctrine, regardless of the district court's willingness to revisit the immunity issue after discovery. *Behrens*, 116 S. Ct. at 839-40, 842; *Mitchell*, 472 U.S. at 524-30; *see also Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396-97 (5th Cir. 1996) (holding that denial of state entity's motion to dismiss a private antitrust suit "on the ground of state action immunity easily meets the[] requirements" of the *Cohen* doctrine); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (holding that denial of private entity's claim of state-action immunity from civil damages suit under antitrust laws was immediately appealable under collateral-order doctrine), *cert. denied*, 116 S. Ct. 1678 (1996).

Here, the Fifth Circuit held that *Cohen* jurisdiction did not exist because the District Court's denial of Petitioners' claimed entitlement to immunity under the Antitrust Relief Act was based on the existence of a disputed issue of fact: whether each entity alleged to have conspired to fix rates of return for charitable gift annuities is described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a). *See* Pet. App. at 10a-11a. That holding conflicts directly with *Behrens* and *Mitchell*.

The District Court denied Petitioners' motion to dismiss due to the existence of an issue of fact only because the District Court made a pure error of law by deciding -- at a logically prior step in its analysis -- that the 1995 Act did not protect "hybrid" conspiracies between "exempt" and "non-exempt" entities. Had the District Court agreed with

Petitioners' legal argument that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the 1995 Act was merely a shorthand reference to recognized 501(c)(3) entities rather than a factual element of the Act's exemption, the District Court would have concluded that the factual issue raised by Respondent's allegation of a "hybrid" conspiracy was irrelevant to Petitioners' claimed right to immunity under the 1995 Act. Accordingly, the District Court's denial of Petitioners' motion to dismiss due to the existence of a disputed fact question actually turned on a pure issue of law, and the Fifth Circuit clearly had appellate jurisdiction under this Court's decisions in *Behrens* and *Mitchell*.[4]

Moreover, even if the presence of an issue of fact deprived the Fifth Circuit of jurisdiction to review the District Court's rejection of Petitioners' claim of immunity under the 1995 Act, Petitioners' entitlement to immunity under the currently applicable 1997 version of the Act clearly presents a pure question of law. Section 2(b) of the 1997 Act grants immunity to "***any*** person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or

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[4]The Fifth Circuit's misapplication of the collateral-order doctrine is apparent in its statement that, "[e]ven were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501(c)(3) determinations are factual." Pet. App. at 11a n.11 (citations omitted). If, as Petitioners contend and the Fifth Circuit assumed for sake of argument, "the Relief Act legalize[d] conspiracies between exempt and non-exempt entities," then the status of the Defendants as "exempt" or "non-exempt" is irrelevant, and the Fifth Circuit's statement that jurisdiction is lacking because Richie's challenges concerning this irrelevant issue "are factual" cannot be correct. A factual dispute concerning an immaterial issue is no bar to *Cohen* jurisdiction. *Behrens*, 116 S. Ct. at 842.

payment of charitable gift annuities . . . ." (Emphasis added). Under the 1997 version of the Act, Petitioners' motion to dismiss Respondent's antitrust claim for "conspir[ing] to fix the rates of return on charitable gift annuities" clearly cannot be defeated by a factual inquiry. Accordingly, any defect in the Fifth Circuit's jurisdiction to hear Petitioners' appeal was cured by the 1997 legislation. *See* H.R. Rep. No. 146 at 5 ("A defendant unsuccessful in obtaining dismissal or summary judgment based on the immunity granted" by the 1997 Act "will have the right to interlocutory appeal of that ruling. *Behrens v. Pelletier*, 116 S. Ct. 834 (1996).").

C. Imposing Appellate Sanctions in this Case of First Impression under the Antitrust Relief Act Was an Abuse of Discretion Meriting this Court's Review.

Imposing appellate sanctions in any case of first impression is a dangerous enterprise, because it tends to chill development of the law and unduly expose the judicial temperament of the sanctioning court to criticism if the legal conclusions underlying its findings of frivolity are later rejected by this Court or, as in this case, by Congress. Imagine, for example, how overzealous it would have appeared in hindsight for the Ninth Circuit to have sanctioned the defendants-appellants in the above-cited *Behrens* and *Hartford Fire Insurance* cases, who lost in that court jurisdictional and immunity arguments similar to those at issue here, only to prevail on those arguments in this Court. Where appellants have acted in good faith in pressing novel arguments, merely being wrong -- or being ***perceived*** by the court of appeals to be wrong -- should rarely, if ever, be enough to justify sanctions. Imposing sanctions in this case of first impression under a statute that the District Court and the Fifth Circuit conceded to have been enacted to dispose of this very lawsuit, *see* Pet. App. at 5a-6a, 25a-26a,29a, was a clear abuse of discretion warranting this Court's review on writ of certiorari.

1. Basing Sanctions on the Fifth Circuit's Jurisdictional Analysis Was a Clear Abuse of Discretion.

As noted above, the Fifth Circuit concluded that it lacked jurisdiction under the *Cohen* doctrine because the District Court's denial of Petitioners' motion to dismiss under the 1995 version of the Antitrust Relief Act was based on the District Court's conclusion that Respondent's Fourth Amended Class Action Complaint presented a genuine issue of material fact: whether Petitioners had conspired with "non-exempt" entities to fix rates of return for charitable gift annuities. Pet. App. at 10a-11a. Describing its conclusion that jurisdiction was lacking under the *Cohen* doctrine as "obvious" and "not arguable," the Fifth Circuit imposed monetary sanctions against Petitioners for "collaterally appeal[ing] the district court's ruling in the face of its true basis." *Id.* at 21a-22a. Because the Fifth Circuit's conclusion that it lacked jurisdiction was wrong as a matter of law, its reliance on that analysis to impose sanctions against Petitioners was an abuse of discretion.

The District Court's conclusion that Petitioners were not entitled to dismissal under the 1995 Act resulted from a five-step reasoning process. The District Court held:

> (1) that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the 1995 Act was not merely a shorthand reference to recognized 501(c)(3) entities but a factual element of the Act's exemption,
>
> (2) that, regardless of prior IRS determinations of charities' respective tax-exempt statuses, the Act's protections were available only to defendants proven in court to be "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26,"
>
> (3) that any defendant proven to be so described and so exempt would nevertheless lose the Act's

protection if it were found to have participated in a rate-setting agreement with a "non-exempt" entity, (4) that, in light of the Respondent's allegations of a "hybrid" conspiracy among "exempt" and "non-exempt" entities, each defendant seeking to invoke the protections of the Antitrust Relief Act must plead and prove (i) that it was "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" and (ii) that every entity with whom it allegedly conspired to set annuity rates also was so described and so exempt, (5) that Petitioners had not carried that burden.

See Pet. App. at 27a-32a.

On appeal, Petitioners argued that the District Court's reversible legal error lay in the first four steps of its five-step reasoning process. Petitioners argued that the plain language of the Antitrust Relief Act embodied the fundamental antitrust principle that, to be unlawful, a price-fixing agreement must be between or among 2 or more horizontal competitors. In Petitioners' view, the plain language of the Act immunized rate-setting agreements involving 501(c)(3) entities and others, because such agreements would be unlawful, if at all, only insofar as they involve 2 or more horizontal competitors -- that is, 2 or more 501(c)(3) entities capable of issuing charitable gift annuities. Further, Petitioners argued that reading the Act to make an issuer's immunity turn on allegations of non-exempt activities by others would unfairly penalize charities without advancing any discernible antitrust or tax policy. Finally, Petitioners argued that reading the Act to make issuers' immunity turn on the 501(c)(3) statuses of others frustrated Congress' unambiguous intent by destroying charities' incentives to participate in rate-setting agreements. *See* Pet. App. at 83a-104a.

The Fifth Circuit clearly understood that Petitioners were challenging the District Court's interpretation of the Antitrust Relief Act to make each charity's immunity turn on the bona fide 501(c)(3) status of every other participant

in the alleged conspiracy. Indeed, the Court of Appeals addressed and rejected that challenge on its merits:

> . . . [E]ven assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

Pet. App. at 9a. Nevertheless, the Fifth Circuit's jurisdictional analysis focused solely on the fifth step of the District Court's reasoning process.

The Court of Appeals apparently failed to recognize that the District Court's conclusion in step five of its reasoning process -- that a fact issue barred dismissal -- was simply the product of its antecedent legal conclusions in steps 1 through 4, which Petitioners challenged on appeal. Thus, the Court of Appeals failed to recognize that, even if the District Court was correct to conclude that the 1995 Act did not immunize so-called "hybrid" conspiracies, Petitioners' challenge to that dispositive legal conclusion on appeal gave the Fifth Circuit appellate jurisdiction under *Behrens* and *Mitchell*.

In light of the Fifth Circuit's jurisdictional error, its imposition of appellate sanctions was an abuse of discretion.

2. Basing Sanctions on the Fifth Circuit's Misinterpretation of the Antitrust Relief Act Also Was an Abuse of Discretion.

In concluding that the District Court properly denied Petitioners' motion to dismiss, the Fifth Circuit held that the "plain language" of the 1995 version of the Antitrust Relief Act compels the conclusion that ***only*** bona fide 501(c)(3) organizations are entitled to the Act's immunity and that the participation of even one non-501(c)(3) entity in an

otherwise immunized rate-setting agreement destroys the immunity for all participants. Pet. App. at 9a-10a. Citing Respondent's conclusory allegations that the Council and some of its sponsors are not bona fide 501(c)(3) entities, the Fifth Circuit erroneously concluded that Respondent had pleaded facts that, if true, would deprive Petitioners of immunity. *Id.*

As demonstrated below, the Fifth Circuit's interpretation of the 1995 Act effectively nullified it without advancing any discernible public policy. Thus, imposing sanctions against Petitioners' for failing to recognize that interpretation as "obvious" was a clear abuse of discretion.

a. The Fifth Circuit's Interpretation Ignored Common Antitrust Principles.

The Fifth Circuit erred in concluding that the "plain language" of the 1995 Act compelled the conclusion that an agreement among 501(c)(3) entities and non-501(c)(3) entities falls outside the Act's immunity. Read in light of generally applicable principles of antitrust law, the 1995 Act plainly immunized Petitioners from Respondent's price-fixing claim, regardless of the 501(c)(3) status of the Council or any other non-issuer.

i. Only Competitors Can Price Fix; The Participation of Non-Competitors Is Irrelevant.

To violate Section 1 of the Sherman Act, a horizontal price-fixing agreement must be an agreement between or among competitors. "[A]n agreement not to compete between two parties who are not actual or potential competitors is not per se or otherwise illegal." *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990), *cert. denied sub nom., Rutland v. United States,* 499 U.S. 936 (1991). Thus, the defining quality of an unlawful horizontal price-fixing agreement is the participation of at least two entities that

compete with one another in the same market. *See, e.g., Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 470 (5th Cir. 1992). Although participation by persons who do not compete with other members of the conspiracy does not negate the existence of an actionable price-fixing agreement, such participation is neither a necessary nor a sufficient condition to antitrust liability. For antitrust purposes, the participation of such non-competitors is wholly irrelevant.[5]

ii. The Text of the 1995 Act Reflected the Necessity of Horizontal Competition.

Read in light of the fundamental requirement of horizontal competition, the plain language of the 1995 Act immunized all combinations alleged to be unlawful on the ground that they constituted horizontal agreements to fix the rates of return for charitable gift annuities. The 1995 Act immunized all such combinations by immunizing the aspect of each that allegedly would violate the law: a rate-setting agreement between or among two or more horizontal "competitors" for the issuance of charitable gift annuities -- that is, "2 or more persons described in section 501(c)(3) of title 26 that are exempt from taxation under section 501(a) of title 26." Because the 1995 Act provided that it shall not be unlawful for two or more "competing" issuers of charitable gift annuities to set uniform rates of return, the Act necessarily provided that it shall not be unlawful for two

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[5]Thus, contrary to footnote 10 of the Fifth Circuit's opinion, there is no generally applicable "rule of forfeiture" providing that an "exempt entity" that conspires with a "non-exempt entity" loses its antitrust immunity. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781-84 (1993) (Capper-Volstead's "rule about acting in concert with nonexempt parties" is "inapplicable" outside the Capper-Volstead context). Rather, each exemption from the antitrust laws must be applied consistently with its purpose in light of antitrust principles. *See Hartford*, 509 U.S. at 783-84 (reasoning that antitrust exemption is not necessarily lost where parties who were entitled to such exemption engaged in concerted conduct with persons to whom exemption arguably did not apply).

or more "competing" issuers, joined by one or more "non-competing" non-issuers, to set such uniform rates.

The Fifth Circuit erred by making antitrust immunity turn on facts that cannot possibly affect "competition" in the "market" for charitable gift annuities. Commercial banks and insurance companies, for example, do not -- indeed, cannot -- issue charitable gift annuities. *See* 26 U.S.C. § 170(c). Nor do accountants, attorneys, or actuaries. *See id.* Thus, their participation in the alleged price-fixing scheme could have no antitrust impact in the "market" for charitable gift annuities. Further, Respondent has not even attempted to allege that the participation of such entities in the affairs of the Council had an impact on interstate commerce in the highly competitive market for commercial investment products, which is composed of thousands of sellers. Neither has Respondent alleged that his ward suffered injury by purchasing commercial investment products at rates that were lower than they would have been absent commercial entities' participation in the Council's affairs. Thus, the alleged involvement of commercial banks and insurance companies, like the involvement of attorneys, accountants, and actuaries, is irrelevant to the application of the Act to the allegations of this lawsuit.[6]

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[6]The legislative history of the 1995 Act confirms that Congress was not concerned by the role of the American Council or any other non-issuing entities. *See* H.R. Rep. No. 336, 104th Cong., 1st Sess., at 6 (1995) (stating that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants and others . . . when assisting [501(c)(3) organizations] in the issuance of a charitable gift annuity or the setting of charitable annuity rates"). Congress clearly intended the conduct immunized by the 1995 legislation "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." *Id.*

b. The Fifth Circuit's Interpretation of the 1995 Act Produced Absurd Results.

As demonstrated above, the Fifth Circuit erred by concluding that each issuer's immunity under the 1995 Act depended on the tax-exempt status of alleged co-conspirators that do not issue charitable gift annuities. The Fifth Circuit also erred by concluding that Congress intended each issuer's immunity to turn on the bona fide 501(c)(3) status of every other issuer. The latter error appears immediately upon consideration of the following example.

Assume a rate-setting agreement formed in 1996 between two issuers of charitable gift annuities: one proven in 1999 to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) and another proven in 1999 to fail the 501(c)(3) criteria. Under the Fifth Circuit's logic, the issuer proven to satisfy the 501(c)(3) criteria could be held liable regarding all charitable gift annuities issued by either issuer from 1996 through 1999, even if it had carefully examined the other issuer's IRS determination letter before entering what it justifiably believed to be a lawful rate-setting agreement. Further, because there is no right of contribution in antitrust cases, *see Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-46 (1981), the qualified issuer could -- at the sole election of the plaintiff -- be forced to pay the entire judgment, including treble damages and attorneys' fees, while the other issuer could avoid paying a dime in damages.

The Fifth Circuit's result was even more unjust. The Fifth Circuit's holding stripped charities of their immunity based on bare, conclusory ***allegations*** that some of the defendants are not bona fide 501(c)(3) entities. Because this result is "so bizarre that Congress 'could not have intended' it," the Fifth Circuit should have rejected it. *See Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

c. The Fifth Circuit Nullified the 1995 Act.

The 1995 version of the Antitrust Relief Act codified Congress' decision that, in order to achieve more important philanthropic goals, the "market" for charitable gift annuities will not be price competitive. By passing the Act, Congress sanctioned the elimination of "price" competition for charitable donations through charitable gift annuities so that charities may "compete" for such donations solely in terms of their good works. This is the only logical interpretation of permitting all issuers of charitable gift annuities "to use, or to agree to use," uniform rates.

By interpreting the 1995 Act to expose dozens of charities to the costs of litigation and the possibility of treble damages and attorneys' fees based on the mere ***allegation*** that a handful of others are not bona fide 501(c)(3) organizations, the Fifth Circuit thwarted the Act's purpose. By effectively making each charity the insurer of the 501(c)(3) status of every party to a rate-setting agreement, the Fifth Circuit's decision surely would have deterred charities from entering future rate-setting agreements aimed at achieving Congress' objective of removing "price" competition from the arena of charitable giving.

Moreover, the Fifth Circuit's nullification of the 1995 Act came at the service of nothing. Given Congress' acceptance of a "market" for charitable gift annuities that is devoid of price competition, it would be unreasonable to conclude that donors such as Respondent's ward suffered a cognizable antitrust injury simply because a few alleged participants in an otherwise lawful rate-setting agreement ***allegedly*** do not satisfy the criteria set forth in 26 U.S.C. § 501(c)(3). Certainly, the Fifth Circuit's opinion does not explain:

(1) how the participation of non-501(c)(3) organizations in an otherwise admittedly legal agreement could have possibly injured Respondent's ward by reducing price competition in the "market" for charitable gift annuities, which Congress has unanimously and unequivocally stated is one in which no price competition is required,

(2) why Congress might rationally have chosen to differentiate between rate-setting agreements in which no non-501(c)(3) entities are alleged to have participated and rate-setting agreements in which one or more non-501(c)(3) entities is alleged to have joined, or

(3) why, by so differentiating between rate-setting agreements, Congress might rationally have chosen to make charities' immunity from antitrust suits turn on the mere allegation of facts having no antitrust significance whatsoever.

Rather, the Fifth Circuit simply concluded, without any supporting logic, that the 1995 Act's "plain language" unavoidably compelled this result that frustrated Congress' intent, subjected as many as 1900 charities to suit for conduct Congress plainly intended to protect, and wasted the resources of those charities through further litigation. Imposing sanctions on that basis was an abuse of discretion.

3. The Actions of the District Court and Congress Belie the Propriety of Sanctions.

As demonstrated above, the legal conclusions underlying the Fifth Circuit's imposition of sanctions were wrong as a matter of law. But, even if the Fifth Circuit's legal conclusions had been correct, its determination that those conclusions were "obvious" and "not arguable" (Pet. App. at 21a-22a) is belied by the District Court's letter admitting that even the District Judge, "[a]fter reading more cases and further consideration of the arguments," was "not so sure of the plaintiffs' position" regarding the "hybrid conspiracy" issue. Pet. App. at 110a. Sanctioning Petitioners for failing to recognize as "obvious" a legal conclusion about which the District Court confessed misgivings in a letter the Fifth Circuit cited in its opinion imposing such sanctions (*see* Pet. App. at 22a) raises at least an appearance of impropriety. Moreover, Congress' recent amendments to the Antitrust Relief Act confirm that Petitioners' interpretation of the 1995 Act was far more consistent with its legislative intent

than the Fifth Circuit's. Accordingly, this Court, which has not previously articulated a standard to be applied under FED. R. APP. P. 38, should grant certiorari to correct the Fifth Circuit's abuse of its discretion under FED. R. APP. P. 38 and to articulate a stringent standard for imposing appellate sanctions in cases of first impression.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the Court deems argument of this case to be unnecessary, Petitioners request that the Court grant the writ and summarily reverse the judgment of the Court of Appeals or, in the alternative, grant the writ, vacate the judgment below, and remand the case to the Fifth Circuit for reconsideration in light of Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997).

August 19, 1997

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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11332

DOROTHY L. OZEE,
acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T. Peter, on behalf of Louise T. Peter individually and all others similarly situated;

Plaintiff,

BOYD L. RICHIE,
guardian of the estate of Louise T. Peter,

Plaintiff-Appellee,

VERSUS

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., individually and on behalf of its members, sponsors and all other similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association, et al.,

Defendants-Appellants,

DAN MORALES, Attorney General of Texas,

Appellant.

* * * * * * * * * * * * * * * * * * * *

No. 96-11439

In re AMERICAN COUNCIL ON GIFT ANNUITIES, INC., et al.,

Petitioners.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This consolidated case consists of an appeal by the various above-listed defendants from the district court's denial of a motion to dismiss, a separate appeal by Northwestern University challenging the denial of summary judgment, a petition by the defendants for a writ of mandamus, an additional appeal by Texas Attorney General Dan Morales from the denial of his motion to intervene as of right, and a motion by Boyd Richie to dismiss the defendants' and Northwestern's appeals. For the reasons stated below, we dismiss the defendants' and Northwestern's appeals for want of jurisdiction, deny the petition for mandamus, reverse the denial of intervention, and impose sanctions on appeal.

I.

This litigation stems from charitable donations by Louise Peter, a ninety-six-year-old woman, to the Lutheran Foundation of Texas, one of the many defendants. Peter, who suffers from dementia and Alzheimer's disease, inherited a substantial fortune from her brother late in life. Her guardian, Boyd Richie, alleges that soon thereafter, the leaders of the Lutheran Church-Missouri Synod began unscrupulously pressuring Peter to let them manage her money. After resisting for years, she eventually invested $1.7 million with the Lutheran Foundation of Texas. Approximately $1.5 million of this went into a revocable management trust and a charitable remainder unitrust; the

remaining $200,000 went to buy charitable gift annuities, the financial products that are the epicenter of this lawsuit.

Charitable gift annuities are hybrids of altruism and capitalism. To purchase one, the donor or "annuitant" writes a check to a charitable organization. The charity, in return, promises to pay the annuitant a fixed stream of income for the remainder of his life. Precisely how much the annuitant will receive per year depends primarily on the size of the "donation" and the annuitant's age—the older he is, the more he receives, because the older he is, the less the time is during which the charity expects to have to pay the annuity.

As with bonds, the annual payout is expressed as a percentage, which is referred to as the charitable gift annuity rate. Unlike with bonds, however, the principal on which this "interest" is being paid becomes the property of the charity when the check is handed over. In other words, the annuitant trades a "donation" to a charity for a guaranteed stream of income that continues as long as he lives.[1]

In many respects, then, charitable gift annuities are quite similar to the commercial annuities sold by life insurance companies. As with commercial annuities, an annuitant who outlives his actuarial life expectancy stands to reap a substantial profit, the gift portion of the "donation" notwithstanding. The difference is that charitable gift

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[1]For tax purposes, the Internal Revenue Service ("IRS") considers the initial transfer that starts the charitable gift annuity to be a "bargain sale," i.e., a sale of property for less than its fair market value. The difference between actuarially determined fair market value and the transfer price is considered a gift, and the gift portion of the transfer is required to be at least 10% of the total. Thus the IRS breaks the transaction in two: Part of the transfer is deemed to have purchased a normal commercial annuity that yields taxable income, and part is a tax-deductible charitable gift.

annuities also provide the annuitant a large tax deduction and the satisfaction of having given to the charity of his choice, advantages that the plaintiffs in this case contend make charitable gift annuities competitive with other financial products.

Enter the principal defendant, the American Council on Gift Annuities, Inc. (the "Council"). According to Richie, the Council was formed years ago to suppress competition among charities in setting gift annuity rates, which competition apparently would have had the undesirable effect of causing potential donors to shop for the best rate. The Council purportedly sets rates that it warns charities not to exceed, actively monitors compliance, and lobbies against government regulation of the charitable gift annuity industry. Richie thus alleges that the Council is the hub of a vast, sinister price-fixing conspiracy comprising charities across the country.

Dorothy Ozee, Peter's grand-niece and next friend, filed suit in federal district court alleging (1) that the Council and numerous other organizations (hereinafter, "the defendants") had violated § 1 of the Sherman Act by agreeing to fix rates of return on charitable gift annuities; and (2) a number of supplemental Texas state law claims, including illegal sale of annuities and breach of fiduciary duty. The defendants moved to dismiss the antitrust claims on the ground that charitable donations do not constitute "trade or commerce" within the meaning of the Sherman Act.[2] The district court denied the motion to dismiss and granted partial summary judgment in Peter's favor on one state law claim of illegal sale of annuities. A Texas state court later appointed Richie guardian of Peter's estate, so

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[2]Section 1 of the Sherman Act provides in relevant part that " [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1.

Ozee's name was dropped from the suit, and Richie was substituted as the named plaintiff.

Perhaps recognizing that the denial of their first motion to dismiss did not bode well for their chances of success on the merits, the defendants decided to attack their problem from another angle: They persuaded both Congress and the Texas Legislature to pass bills specifically designed to squelch this suit. The federal bill, which the President signed into law on December 8, 1995, was entitled the Charitable Gift Annuity Antitrust Relief Act (the "Relief Act"), and provided that

> it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

15 U.S.C. § 37 (a). Congress made the Relief Act explicitly retroactive. Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, § 4, 109 Stat. 687, 688 (1995). The Texas Legislature passed parallel legislation designed to foreclose Richie's state law claims by retroactively allowing nonprofit organizations to both sell annuities and operate trusts. *See* TEX. BANKING CODE ANN. art. 342-1113(3) (Vernon Supp. 1997);[3] TEX. REV. CIV. STAT. ANN. art. 1396-

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[3]"The provisions of this chapter shall not affect or apply to . . . (3) a corporation serving as trustee of a charitable trust as provided by Article 2.31, Texas Non-Profit Corporation Act (Article 1396-2.31, Vernon's Texas Civil Statutes)." TEX. BANKING CODE ANN. art. 342-1113, -1113 (3) (Vernon Supp. 1997).

2.31 (Vernon Supp. 1997);[4] TEX. INS. CODE ANN. art. 1.14-1A § 2(a)-(b) (Vernon Supp. 1997).[5]

Armed with this new legislation, the defendants filed another motion to dismiss and, in the case of defendant Northwestern University ("Northwestern"), a motion for summary judgment. In response, Richie both challenged some of the defendants' § 501(c)(3) exemptions and amended his complaint to allege a price-fixing conspiracy between entities that fit the Relief Act's exemption and entities that do not.[6] The district court issued thirty-five orders, the most important of which, dated September 30, 1996, denied the defendants' motion to dismiss, Northwestern's motion for summary judgment, and Morales's motion to intervene as of right. *See Richie v. American Council on Gift Annuities*, 943 F. Supp. 685 (N.D. Tex. 1996). It is from this second refusal to dismiss that the defendants now appeal.

In addition to the defendants' collective appeal from the refusal to dismiss, Northwestern individually appeals the denial of summary judgment. Morales brings a separate interlocutory appeal, arguing that he should have been

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[4]"A corporation that is described by Section 501(c)(3) or 170(c), Internal Revenue Code of 1986, or a corresponding provision of a subsequent federal law, may serve as the trustee of a trust: (1) of which the corporation is a beneficiary; or (2) benefiting another organization described by one of those sections of the Internal Revenue Code of 1986, if the service as trustee is in furtherance of the purposes for which the corporation was formed." TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1997) (footnote omitted).

[5]"Sec. 2. (a) The issuance of a qualified charitable gift annuity does not constitute engaging in the business of insurance in this state. (b) A charitable gift annuity issued before September 1, 1995, is a qualified charitable gift annuity for purposes of this article and Article 1.14-1 of this code, and the issuance of that charitable gift annuity does not constitute engaging in the business of insurance in this state." TEX. INS. CODE ANN. art. 1.14-1A § 2(a)-(b) (Vernon Supp. 1997).

[6]For convenience, we henceforth refer to such conspiracies as "hybrid" conspiracies.

allowed to intervene as of right under FED. R. CIV. P. 24(a). The defendants (again, collectively) petition for a writ of mandamus, requesting dismissal of both the state and the federal claims on the grounds that the district court abused its discretion by (1) refusing to grant the second motion to dismiss, (2) asserting jurisdiction to consider whether defendants meet the Relief Act's requirements for antitrust exemption; (3) refusing to grant the first motion to dismiss; and (4) refusing to enter summary judgment on the Texas state law issues. Finally, Richie moves this court to dismiss the defendants' appeals on numerous grounds, most notably for want of appellate jurisdiction.

II.

A.

The central issue is this court's jurisdiction to hear the appeal. The statute codifying the final judgment rule, 28 U.S.C. § 1291, provides that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Appeal is thereby precluded from decisions that are "tentative, informal, or incomplete," as well as from "fully consummated decisions" that are "but steps towards final judgment in which they will merge." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the refusal to dismiss is obviously not a "final decision," *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 824 (1986) (citing *Fluor Ocean Servs. v. Hampton*, 502 F.2d 1169, 1170 (5th Cir. 1974)), the only way the defendants can hope to assert jurisdiction is through the collateral order doctrine.

The collateral order doctrine permits appeal of non-final decisions that "fall in that small class [of interlocutory decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be

deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. The doctrine thus allows review of orders that (1) conclusively determine the disputed question; (2) resolve an issue that is completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgement. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *see also Cohen*, 337 U.S. at 545-47. As its stringent requirements indicate, the collateral order doctrine is not to be applied liberally. Rather, the doctrine "is 'extraordinarily limited' in its application." *Pan E. Exploration Co. v. Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) (citation omitted). Moreover—and particularly apposite to this case—appealability under the collateral order doctrine must be determined "without regard to the chance that the litigation might be speeded, or a 'particular injustice' averted by a prompt appellate court decision." *Digital Equip.*, 511 U.S. at 868.

As a general matter, the refusal to dismiss an action under FED. R. CIV. P. 12(b)(6) is not appealable.[7] Recognizing the predicament in which these decisions place them, the defendants argue that the Relief Act gives them an immunity from suit and that the refusal to dismiss denied them that immunity, as denials of motions to dismiss on the basis of qualified or absolute immunity frequently are appealable as collateral orders.[8]

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[7]*See, e.g., Morin v. Caire*, 77 F.3d 116, 119 (5th Cir. 1996) ("Ordinarily, this court does not have jurisdiction over the denial of a Rule 12(b)(6) motion to dismiss for no cause of action, because such an order is interlocutory in nature."); *Holloway v. Walker*, 765 F.2d 517, 525 (5th Cir.) (same), *cert. denied*, 474 U.S. 1037 (1985). *Accord Briggs & Stratton v. Local 232 Int'l Union*, 36 F.3d 712, 714 (7th cir. 1994) ("To the extent the union wants us to review the district court's failure to dismiss the case outright, it hasn't a leg to stand on.,), *cert. denied*, 115 S. Ct. 1998 (1995); *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995); *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

[8]*See Digital Equip.*, 511 U.S. at 871; *Williams v. Collins*, 728 F.2d

The defendants' immunity arguments completely miss the mark, however. After the Relief Act was passed, Richie amended his complaint to allege that some of the defendants had procured their 26 U.S.C. § 501(c)(3) tax-exemption determination letters by fraud, and Richie added some plainly non-charitable defendants so as to allege a conspiracy between § 501(c)(3) exempt entities and non-exempt entities.[9] Accordingly, the order denying the motion to dismiss rested on two grounds: (1) That Richie has at least stated a claim as to the defendants he claims are non-exempt; and (2) that he also states a claim insofar as he alleges a conspiracy between exempt and non-exempt organizations.

This second ground is important, for even assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

The defendants argue that the statute means something other than what it says, citing a House report suggesting that the exemption was intended to extend to attorneys, consultants, and other professionals retained by a § 501(c)(3) entity. See H. R. REP. No. 104-336 (1995), reprinted in 1995 U.S.C.C.A.N. 632, 637. We find this suggestion thoroughly unpersuasive. As we stated above, the plain terms of the

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721, 724-26 (5th Cir. 1984); *see also Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

[9]Besides the obviously eleemosynary organizations, Richie's ever-expanding list of defendants includes a number of law firms, insurance companies, and commercial banks that apparently are associated with the administration of charitable gift annuities.

Relief Act cover conspiracies by § 501(c)(3) organizations only; had Congress wished to exempt hybrid agreements, it easily could have done so. As the plain language of the statute is unambiguous, we need not concern ourselves with its legislative history, which appears not to support the defendants' proposition, in any event.[10] *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *United States v. Barlow*, 41 F.3d 935, 942 (5th Cir.1994), *cert. denied*, 115 S. Ct. 1389, *and cert. denied*, 115 S. Ct. 1804, *and cert. denied*, 115 S. Ct. 1804 (1995); *Dillon v. Mississippi Military Dep't*, 23 F.3d 915, 919 n.8 (5th Cir. 1994).

It should be evident, from the above, that because the refusal to dismiss was predicated on Richie's claims of non-exempt defendants and a hybrid conspiracy involving them, the matters it addressed were neither conclusively determined nor separate from the merits of the case. To the contrary, the district court went out of its way to state that it would reconsider the defendants' claims of exemption as soon as there was sufficient evidence to do so. Given that the ruling was based on the possibility of a hybrid conspiracy, we need not consider whether the Relief Act grants § 501(c)(3) organizations some sort of immunity or

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[10]Even were we to look beyond the plain language of the Relief Act, our conclusion that hybrid conspiracies are outside its reach would still be supported by the rule of forfeiture. Under this rule, entities normally exempt from the antitrust laws lose their exemption when they conspire with non-exempt entities. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 782-84 (1993), the Court's most recent pronouncement on this subject, the Court drew a distinction between status-based and conduct-based exemptions, finding the rule of forfeiture applicable to the former but not necessarily to the latter. The exemption created by the Relief Act is based on both status ("persons described in section 501(c)(3)") and conduct ("to use, or to agree to use"), and is thus much more like the Capper-Volstead Act, which has both status and conduct elements, than it is like the McCarran-Ferguson Act, which creates a purely conduct-based exemption. Status is the key, and because Richie is alleging a conspiracy in which some entities have the requisite status-based exemption and some do not, the rule applies.

right not to stand trial. It follows that because the denial of the motion to dismiss did not actually require a finding of no immunity, it is not a collateral order, and we lack jurisdiction to entertain the appeal.[11]

B.

The charitable defendants protest that Richie may not challenge their exempt status, because the district court lacks jurisdiction to reconsider the IRS's determination that they are § 501(c)(3) entities. In effect, they contend that their letters from the IRS finding them to be § 501(c)(3) entities for tax purposes grant an unassailable, irrevocable status as exempt organizations under the Relief Act, and that no one may litigate this issue. Even were we to agree with this, the fact that Richie has alleged a conspiracy between exempt and non-exempt entities would deprive us of jurisdiction to hear this appeal. Our want of jurisdiction, moreover, precludes us from addressing the question of the § 501(c)(3) determination.

III.

Northwestern University separately appeals the denial of its motion for summary judgment, arguing that it has incontrovertibly demonstrated that it is exempt under the Relief Act. As with the defendants' motion to dismiss, Northwestern's motion was denied by the September 30, 1996, memorandum opinion and order on the bases

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[11]Even were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501(c)(3) determinations are factual. *See Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995) ("An appellate court has jurisdiction to review an interlocutory denial of qualified immunity only to the extent that it 'turns on an issue of law.'") (quoting *Mitchell*, 472 U.S. at 530); *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir. 1989) (same).

described above. *See Richie*, 943 F. Supp. at 687-88 n.1. Also as with the motion to dismiss, the order specifically stated—in boldface, no less—that it was denying Northwestern's motion without prejudice. The court went out of its way to note that further discovery was necessary before it could "fairly and correctly rule" on the summary judgment motions before it.

Ordinarily, a denial of summary judgment is an unappealable interlocutory order. *Aldy v. Valmet Paper Mach.*, 74 F.3d 72, 75 (5th Cir.), *cert. denied*, 117 S. Ct. 68 (1996); *Schaper v. City of Huntsville*, 813 F.2d 709, 713 (5th Cir. 1987). The denial of Northwestern's motion falls squarely within this general rule, for the obvious lack of a conclusive and unreviewable determination renders the collateral order doctrine inapplicable. To the extent Northwestern argues that the district court disallowed it an immunity defense, its argument is foreclosed by the same factual issues that precluded the motion to dismiss: Richie's allegations that some of the defendants are non-exempt and that exempt entities conspired with non-exempt ones. As we previously have held, "if disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." *Feagley*, 868 F.2d at 1439. In short, then, we lack jurisdiction to hear Northwestern's claims for largely the same reasons that we lack jurisdiction to hear the defendants'.

IV.

In addition to the above appeals, the defendants[12] also petition for a writ of mandamus, alleging that the district court abused its discretion in (1) refusing to grant the second

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[12]Although they are technically petitioners with respect to this portion of the case, we will continue to refer to the defendants as defendants in the interests of clarity.

motion to dismiss; (2) asserting jurisdiction to consider whether defendants meet the Relief Act's requirements for antitrust exemption; (3) refusing to grant the first motion to dismiss; and (4) refusing to enter summary judgment on the Texas state law issues. The relief they seek is dismissal with prejudice of Richie's federal and state claims.

Most of the petition simply recycles the arguments of defendants' appeal in the substantially stricter mandamus context. Mandamus is "an extraordinary remedy for extraordinary causes," *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (en banc), and is not intended as a "substitute for appeal," *In re American Airlines*, 972 F.2d 6 05, 608 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993). It is not justified merely because "hardship may result from delay or from an unnecessary trial," *In re Fibreboard Corp.*, 893 F.2d 706, 707 (1990). Rather, the writ issues only where the district court has committed a "clear abuse of discretion" or engaged in "conduct amounting to 'usurpation of power.'" *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989). To succeed, the defendants must show (1) that they lack adequate alternative means to obtain the relief they seek and (2) that their right to issuance of the writ is "clear and indisputable." *Mallard*, 490 U.S. at 309; *American Airlines*, 972 F.2d at 608; *Fibreboard*, 893 F.2d at 707.

This the defendants cannot show. As to the first two challenged actions—the refusal to grant the second motion to dismiss and the assertion of jurisdiction over the defendants' status as exempt entities—our discussion above explains why defendants' right to the relief they seek is anything but "clear and indisputable."

They fare little better on the refusal to grant the first motion to dismiss, which was predicated on a finding that the conduct challenged in this case is "trade or commerce" within the meaning of the Sherman Act. As Richie points out, the "exchange of money for services, even by a nonprofit

organization, is a quintessential commercial transaction." *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993).

The purchasers of charitable gift annuities pay money and receive benefits in return: the annuity, substantial tax advantages, and the satisfaction of having given to charity. As the IRS recognizes, at least part of the transaction is undoubtedly commercial, and the transaction as a whole is a far cry from the sort of "antithesis of commercial activity" that it need be in order to fall outside the scope of the Sherman Act. *Brown*, 5 F.3d at 666.

Nor can the defendants succeed in their arguments regarding the summary judgment on Richie's state law claims. Twenty days after the district court entered that summary judgment, the governor signed into law two pieces of legislation that purport to "clarify" the Texas Insurance Code, the Free Enterprise and Antitrust Act, and the Deceptive Trade Practices Act, so as to leave no doubt that charities need not be licensed insurance companies in order to issue charitable gift annuities. [13] Much as it might want to, however, the legislature cannot reverse a federal district court. The defendant , the Texas legislature, and the two state courts that have construed this legislation have consistently vacillated as to whether H.B. 3104 merely "clarified," or instead retroactively changed the law. They appear to want it both ways: They would like retroactivity to get rid of Richie's suit, and "clarification" so as not to run afoul of the "open courts" provision of TEXAS CONST. art. 1, § 13.

Fortunately, we need not delve into matters of state law, federalism, and separation of powers to resolve this issue, for the defendants have failed to demonstrate that they meet

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[13]See TEX. BANKING CODE ANN. art. 342-1113, -1113 (3) (Vernon Supp. 1997); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Vernon Supp. 1997); TEX. INS. CODE ANN. art. 1.14-1A, § 2(a)-(b) (Vernon Supp. 1997).

the first requirement for mandamus relief, the unavailability of alternative means. The summary judgment they complain of is addressable both through certified appeal under 28 U.S.C. § 1292(b) and through direct appeal after final judgment. *See In re El Paso Elec. Co.*, 77 F.3d 793, 795 (5th Cir. 1996). The grant of summary judgment was neither an abuse of discretion nor an "usurpation of power, and whatever right petitioners might have to relief on the merits is far from being "clear and indisputable." The petition for writ of mandamus is denied.

V.

We have jurisdiction over the appeal of the denial of intervention as of right under FED. R. CIV. P. 24(a), because such orders are appealable collateral orders. *See Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc) (citing *Ceres Gulf v. Cooper*, 957 F. 2d 1199, 1202 n.5 (5th Cir. 1992)). Our standard of review is *de novo*. *Id.* at 995.

Morales's brief bitterly recounts how he has been left out of this case. As Attorney General, he is charged with representing the public interest in charitable trusts. Under TEX. PROP. CODE ANN. § 123.003 (Vernon 1995), interested parties in proceedings involving charitable trusts must give him notice of the proceeding by sending him "a certified copy of the petition or other instrument initiating the party's involvement in the proceeding." Richie did this, and Morales received his notice on January 9, 1995.

After that, however, things appear to have gone downhill. Morales apparently was not served with most of the pleadings, and he claims that he was unaware of most of the activity in this case until April 1995, at which time he learned that Richie had filed the motion for partial summary judgment on his state law claims. On April 18, 1995, Morales moved for leave to intervene permissively, and the district court denied his request shortly thereafter. He filed

two motions to reconsider this ruling on May 16, 1995, and September 25, 1995, respectively.

On October 17, 1995, Morales filed a second motion for leave to intervene, this time both permissively and as of right. On September 30, 1996, nearly a year later, the district court denied this motion as moot, for the grant of partial summary judgment on Richie's state law claims by then had disposed of all the issues in which the court believed Morales might have an interest. Morales now appeals, challenging only the denial of his motion to intervene as of right.

A.

Morales argues that the district court erred because he meets all the requirements for rule 24(a) intervention: He timely applied; he has an interest in the charitable gift annuities and trusts that are the subject of this suit; disposition of the case without him would impair his ability to protect that interest; and his interest is not adequately represented by the existing parties. See FED. R. CIV. P. 24(a); *Sierra Club v. Espy*, 18 F. 3d 1202, 1204-05 (5th Cir. 1994); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 24.03[l][b], at 24-23 (3d ed. 1997). The test is conjunctive; failure to meet any one of these requirements means that Morales may not intervene as a matter of right. *Sierra Club*, 18 F.3d at 1205 (citing *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285, 1287 (5th Cir.), *cert. denied*, 484 U.S. 817 (1987)). We agree, however, that he meets each of these criteria.

The first part of the intervention calculus is whether Morales's motion was timely filed. The test for timeliness under Rule 24(a) requires us to consider

(1) The length of time during which the would-be intervenor actually knew or reasonably should

have known of his interest in the case before he petitioned for leave to intervene;

(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case;

(3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and

(4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

Edwards, 78 F.3d at 1000. *Accord* 6 MOORE, *supra*, § 24.21[3], at 24-71. As we stated in *Sierra Club*,

> [This] analysis is contextual; absolute measures of timeliness should be ignored. The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained.

18 F.3d at 1205 (citations and internal quotations omitted).

Richie attacks Morales's motion on the ground that it is untimely, citing the district court's rejection of his earlier motion to intervene permissively as untimely. Because the first motion was untimely when filed on April 18, 1995, Richie reasons, the second motion cannot possibly have been timely when filed on October 17 of that year.

This is incorrect. We have consistently held that a "district court should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) [of Rule 24] than if he qualified for intervention under section (b)." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 266 (5th Cir. 1977); *see also McDonald*, 430 F.2d at 1073. Given the difference in standards and the fact that this Court reviews timeliness *de novo*, the determination that Morales's first motion was untimely has little or no bearing on the timeliness of his second motion.

Applying the test for timeliness, we find that the first of the four factors is neutral. It does appear that Morales waited over nine months from the time that he received his statutorily mandated notice to the time that he moved to intervene as of right. Timeliness is dependent on the surrounding circumstances, however, and we have rejected the notion that "the date on which the would-be intervenor became aware of the pendency of the action should be used to determine whether it acted promptly." *Sierra Club*, 18 F. 3d at 1206; *see also Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1209 (5th Cir. 1985). The correct measure of promptness is the extent to which the would-be intervenor delayed action after it became aware that the original parties would not protect its interests. *Sierra Club*, 18 F.3d at 1206.

Under this standard, Morales's delay was lengthy, but not nearly so lengthy as it appears at first blush. It was not until April 1995 that Richie's summary judgment motion alerted Morales to the immediate danger to his interests. He moved to intervene permissively shortly thereafter, and moved to intervene as of right a few months later, after it became apparent that the court would not permit him to do so permissively. Although his actions in moving to intervene as of right were not as prompt as they could have been, neither were they excessively tardy. The first factor is neutral.

The second factor—prejudice to the existing parties resulting from delay—weighs in Morales's favor. "[P]rejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club,* 18 F.3d at 1206. We fail to see, and Richie has failed to point to, any way in which Morales's delayed entry into the suit will prejudice the existing parties. At most, his entry will cause only inconvenience, which does not weigh into our decision.

The third prong—prejudice to the would-be intervenor—also weighs in favor of Morales. This suit's potential for prejudice to the interests of the people of Texas is obvious. Morales's position is unique, for the people's interests are not represented by any of the existing parties. Although Morales suggests that his course of action in the litigation thus far would have paralleled that of the charitable defendants, there could quite easily be some point in the litigation at which his interests will diverge. The fourth factor, which weighs "unusual circumstances," is neutral.

The test for timeliness is not a mathematical formula by which a court simply sums its determinations on each of the four factors to reach an answer. *Edwards,* 78 F.3d at 1004. On balance, however, we think that Morales satisfies the test and that his application was timely, particularly in light of the potential for this litigation to prejudice the interests of the people of Texas.

B.

In order to have a sufficient interest in this case to support rule 24(a) intervention, Morales also must demonstrate that he has a "direct, substantial, legally protectable interest in the proceedings." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.,* 732 F. 2d 452, 463 (5th Cir.) (en banc) (quoting *Diaz v. Southern Drilling Corp.,*

427 F.2d 1118, 1124 (5th Cir. 1970)), *cert. denied*, 469 U.S. 1019 (1984). This means that the interest he is asserting must be one that the law recognizes as his. *Id.* at 464. Rule 24(a) also requires him to demonstrate that "disposition of the action may as a practical matter impair or impede [his] ability to protect that interest."

Morales's status as the public protector of charities and charitable trusts satisfies these requirements. *See* TEX. PROP. CODE ANN. §§ 123.001-005 (Vernon 1995). There can be no serious debate that Richie's suit, if successful, would impair the ability of Texas charities to operate, at least until the charities persuade Congress or the legislature to pass additional exemptions for their conduct.

C.

Under this circuit's caselaw and FED. R. CIV. P. 24 (a), Morales also bears a "minimal" burden of showing that his interest is inadequately represented by the existing parties. *Sierra Club*, 18 F.3d at 1207 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). He need not show that the existing representation necessarily will be inadequate, but only that it "may be" so. *Id.* This prong of the rule 24(a) test sets a low standard. That he meets it is virtually self-evident, for none of the existing defendants can claim directly to represent the interests of the citizens of Texas.

This leads us to conclude that the district court erred in denying Morales's motion to intervene as of right. The relevant portion of the September 30, 1996, order is therefore reversed.

D.

Morales's final contention is that we should reverse and render judgment on Richie's Texas state law claims. This is effectively an appeal from both the partial summary

judgment against the Lutheran Foundation of Texas and the refusal to grant summary judgment for the other defendants. As such, we lack jurisdiction to hear it, and this portion of Morales's appeal is accordingly dismissed.[14]

VI.

Richie's motion to dismiss asks us to acknowledge that the defendants' appeals are frivolous and to award sanctions accordingly. Under FED. R. APP. P. 38, we may award "just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. Unlike sanctions under FED. R. CIV. P. 11, rule 38 sanctions are discretionary.

The threshold consideration is frivolity. In this circuit, a frivolous appeal is either one that pursues legal points not arguable on the merits or one in which the result is obvious.[15]

We find that the defendants' and Northwestern's appeals meet this test. For all their arguments about the Relief Act creating immunity, the defendants and Northwestern have blithely ignored that Richie is alleging some of them to be non-exempt, which creates factual issues, and that he is alleging a hybrid conspiracy. The September 30, 1996, order was unambiguous on this point. Although they throw up a good smoke screen, it defies reality for the defendants to

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[14]See *Resolution Trust Corp. v. United States Fidelity and Guar. Co.*, 27 F.3d 122, 125 (5th Cir. 1994) ("The general rule in the federal courts, of course, is that partial summary judgments are not appealable."); *Bodden v. Osgood*, 879 F. 2d 184, 186-87 (5th Cir. 1989); *Way v. Reliance Ins. Co.*, 815 F. 2d 1033, 1034 (5th Cir. 1987).

[15]*See Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985), *cert. denied*, 493 U.S. 818 (1989); *Coghlan v. Starkey*, 852 F. 2d 806, 810 (5th Cir. 1988) (per curiam) (stating that rule 38 sanctions are appropriate where the outcome of the appeal "is obvious from the comprehensive and decisive exposition of the law by the judge below").

continue to argue that they can collaterally appeal the district court's ruling in the face of its true basis.

As the district court correctly noted, it has never been at issue in this case whether a *bona fide* § 501(c)(3) organization is exempt from liability under the Relief Act. Rather, the real issue has been, and continues to be, whether the defendants are genuine § 501(c)(3) organizations within the meaning of the Act, and whether any agreements they may have made meet the test for exemption. The briefs in this case are voluminous, and the pleadings filed in the district court even more so. As the district court's response to the petition for mandamus put it, "[T]he paper keeps flowing and the meter keeps running. There are 765 documents filed thus far in the district court and my docket sheet in this case rocks on for 116 pages." Yet nowhere do the defendants come to grips with the real issues.

In light of this, we deem it appropriate to assess sanctions that, though not fully compensatory of Richie's costs, are nonetheless substantial enough unequivocally to alert the defendants to the error of their ways. *See Atwood v. Union Carbide Corp.*, 850 F.2d 1093, 1094 (5th Cir. 1988) (per curiam) (assessing attorney's fees "that are more than nominal but considerably less than fully compensatory"), *cert. denied*, 489 U.S. 1079 (1989). The defendants and Northwestern shall pay to Richie $15,000 in partial compensation of his costs and attorney's fees.[16] Counsel for the defendants and Northwestern are admonished henceforth to undertake a more thorough examination of both the decision being appealed and the rules governing our appellate jurisdiction.

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[16]We note, in the interest of clarity, that by "defendants and Northwestern" we do not mean to refer to Morales, who was not a defendant in the district court and whose appeal is not frivolous.

VII.

In summary, Richie's motion to dismiss is GRANTED, and the defendants' and Northwestern's appeals accordingly are DISMISSED. Pursuant to rule 38, the defendants and Northwestern are SANCTIONED $15,000 for their frivolous appeals and are hereby ORDERED to remit that sum to Richie. The petition for writ of mandamus is DENIED. The order denying Morales's motion to intervene as of right is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BOYD L. RICHIE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	7:94-CV-128-X
THE AMERICAN COUNCIL	§	
ON GIFT ANNUITIES, et al.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Now before the Court are:

1) Plaintiff's February 13, 1996 Motion for Leave to File Fourth Amended Class Action Complaint;

2) Defendants' December 14, 1995 Motion to Dismiss;

3) Defendant's August 27, 1996 Renewed Motion for Relief;

4) Defendant Northwestern University's January 26, 1996 Motion for Summary Judgment[1];

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[1]The Court has also read and considered Defendant Northwestern University's separate Reply, filed January 26, 1996, on these issues and its separate Motion, in the alternative, for Summary Judgment, also filed on January 26, 1996. References herein to "Defendants' Motion to Dismiss" include and apply to Defendant Northwestern University's Motion for Summary Judgment since it is also predicated on the new antitrust exemption. Since Defendant Northwestern University's

5) Defendant Lutheran Foundation of Texas's October 26, 1995 Motion to Reconsider the May 3, 1995 Order Granting Partial Summary Judgment; and

6) Defendant American Council on Gift Annuities's and Defendant Lutheran Church-Missouri Synod's November 22, 1995 Motion for Partial Summary Judgment on Texas Statutory Claims.

After having considered these motions and all responses, replies, and surreplies thereto, the motions are hereby **DENIED IN PART, GRANTED IN PART**, unless otherwise stated, as follows.

I.

This case involves a claim that the American Council on Gift Annuities, its members, and various other charities in the United States have been involved in a mass price-fixing conspiracy setting the maximum rates of return with regard to charitable gift annuities. In essence, the plaintiffs claim that these entities collusively fix prices to restrain competition between the various sellers of charitable gift annuities.

On December 8, 1995, the Charitable Gift Annuity Antitrust Protection Act[2] and the Philanthropy Protection Act[3] were enacted. These new federal statutes retroactively

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qualification for this exemption raises material fact issues and because of the conclusory nature of its supporting affidavits, its alternative Motion for Summary Judgment is **DENIED**. See Fed.R.Civ.P. 56 and 52(c).

[2]Pub.L. No. 104-63, 109 Stat. 687 (WESTLAW US-PL 104-63, HR 2525, December 8, 1995, Slip Copy).

[3]Pub.L. No. 104-62,109 Stat. 682 (WESTLAW US-PL 104-62, HR 2519, December 8, 1995, Slip Copy). The Court need not address the applicability of the Philanthropy Protection Act since Plaintiff s Fourth

changed, not "clarified," the laws upon which Plaintiff's federal claims were (and are) based.[4] On December 14, 1996, less than a week after passage of these new amendments, Defendants collectively moved the Court to dismiss[5] Plaintiff's two federal claims, as set forth in Plaintiff's Third Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(6), and 12(c) in view of these new statutory exemptions, and to remand his supplemental state-law claims.

On February 13, 1995, Plaintiff moved the Court for leave to file his Fourth Amended Class Action Complaint which, *inter alia*, would abandon his federal claim under the Investment Company Act of 1940 and his Texas Free Enterprise and Antitrust Act claim, but which would retain his other federal claim under the Sherman Act and his allegations concerning Defendants' illegal sale of annuities and operation of trust businesses. Defendants' Response to that motion argued, in part, that Plaintiff should not be permitted to amend his Complaint because its filing would be futile since Plaintiff's Fourth Amended Class Action Complaint would still fail to state a claim upon which relief can be granted in light of the newly-enacted, retroactive

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Amended Complaint abandons its claim pursuant to the Investment Company Act of 1940.

[4]If nothing else, this case has underscored in this judge's mind the wisdom of the founding fathers' decision to separate the powers of government into three distinct 'branches,' with one of those branches being an independent judiciary with life tenure to insulate judicial decisions from the pressures of political activity and public opinion. Despite all the obvious activity of lobbyists, public relations persons, and other assorted spin doctors, this case is not as simple and easy as many would like to believe.

[5]Defendant Northwestern also moves, in the alternative, for summary judgment on these same legal issues pursuant to Fed.R.Civ.P. 56(c).

antitrust exemption.[6] Since, however, Defendants have not established "beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), i.e., since there still exists the possibility that Defendants will not be able to prove that they qualify for the new antitrust exemption, Defendants' Motion to Dismiss Plaintiff's Sherman Act claim pursuant to Rule 12(b)(6) must be denied. Consequently, Plaintiff's proposed amendment is not futile since his Fourth Amended Complaint alleges facts which could potentially state a claim, even given the new statutory exemption; therefore, his Motion for Leave to File Fourth Amended Class Action Complaint is granted in all respects.

II.

Section 2(a) of the Charitable Gift Annuity Antitrust Relief Act ("Antitrust Relief Act"), which amends state and federal antitrust laws, provides as follows:

> (a) EXEMPT CONDUCT. -- Except as provided in subsection (b)[7], it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

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[6]*See Avatar v. Exploration Inc. v. Chevron U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980).

[7]Subsection (b) relates only to State statutes passed after the effective date of the Charitable Gift Annuity Antitrust Relief Act.

The "antitrust laws" to which this provision refers are defined in § 3 of the Antitrust Relief Act, and § 4 of the Antitrust Relief Act makes this exemption retroactively applicable.

As with any statutory question, the Court begins with the language of the statute. *Kellogg v. United States (In re West Texas Marketing Corp.)*, 54 F.3d 1194, 1200 (5th Cir.), *cert. denied*, 116 S.Ct. 523 (1995). In determining a statute's plain meaning, it is assumed that, absent any contrary definition, "Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Services v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (internal quotation marks omitted). As the Supreme Court has stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (internal quotation marks omitted). Where the statutory language is clear, as it is here, "the inquiry should end." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Since Defendants maintain that "Congress used the language 'described in section 501(c)(3)' and 'exempt from taxation under section 501(a)' as a traditional shorthand reference to 501(c)(3) organizations -- not as distinct factual elements of the exemption granted by the new legislation"[8], the plain meaning of this statute is called into question. However, only if the statutory language is ambiguous are courts to proceed beyond the language as written. *Ron Pair Enterprises, Inc.*, 489 U.S. at 241. Here, the literal language of the statutory text unambiguously specifies two requirements for the Act's antitrust exemption: (1) an entity described in 26 U.S.C. § 501(c)(3) that is tax exempt under § 501(a); and (2) use of, or agreement to use, the same

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[8]Defendants' Reply at page 3.

annuity rates with another such organization. Defendants' contention that this first requirement simply means "having a 501(c)(3) determination letter" is not the statute's plain meaning, but merely their subjective twist on the text's plain language commonly understood meaning. If it were, it could have been easily included. The Court cannot conclude that Congress meant one thing while saying another. Because the language of the new exemption is unambiguous, "the sole function of the court is to enforce it according to its terms." *Ron Pair Enterprises, Inc.*, 489 U.S. at 241 (internal quotation marks omitted).

Although floor debate may indicate that the new legislation was clearly meant to dispose of this lawsuit[9] and

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[9]"[A]n ominous class action lawsuit in a Federal court in Texas has put American philanthropy in jeopardy. Specifically, this lawsuit disingenuously attempts to apply securities and antitrust laws meant to govern commercial enterprises to fundraising and money-management techniques of charities. This is an application of Federal law never contemplated by Congress." 141 Cong. Rec. S17828 (daily ed. November 29, 1995) (statement of Senator Pressler). Senator Pressler's message has been received and the Court is acutely aware that the new legislation was directed at this suit.

The Court is also not unaware of or unsympathetic to the realities of the adverse effects this lawsuit may have on legitimate charities that do much good. All lawsuits have a negative effect on all defendants. In fact, this Court has over 400 of them, and most if not all of those defendants want their cases heard so the negative effects of their lawsuits can be removed. Nevertheless, this Court may not do what it believes is 'right,' but must do what the law explicitly requires. And, even though the Court has no doubt as to what Congress wanted to accomplish, applying what they wrote to trigger the exemption, however, is slightly more problematic.

In February, when the Court indicated that a ruling on these issues would be forthcoming in April, the Court meant what it said. Unfortunately, soon afterward, the Court was deluged with motions in the record-breaking number of cases filed this year. This time-crunch was exacerbated by the Court's criminal docket (which takes precedence), Congress's recent penchant for federalizing traditional state crimes, the hours involved in calculating sentencing guidelines, not to mention the

the American public, if polled by Gallup or Harris, would probably resoundingly want to put the kibosh to this lawsuit, the Court resists the temptation to "read into" the statute what "everyone clearly intended." To do so would, in the Court's opinion, be to engage in the very sort of judicial activism that so many proponents of this legislation disdain. The Court cannot get from the legislative history what the language of the statute unambiguously denies. As the Fifth Circuit paraphrased Justice Oliver Wendell Holmes, "we do not inquire what Congress meant; we only ask what it said." *Guilzon v. C.I.R.*, 985 F. 2d 819, 823 n. 11 (5th Cir. 1993).

Furthermore, the Court must strictly construe this plain qualifying language in the § 2(a) exemption in the Antitrust Relief Act since exemptions from the antitrust laws must be construed narrowly. *E.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Antitrust exemptions must be applied in a way that minimizes the risk that unprotected activity will escape remedy, thereby jeopardizing national competition policy.[10] Thus, the Court

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six year vacancy of a judgeship position in the Northern District of Texas. All things considered, this case has been given exceptional attention, contrary to what is implied in footnote one of Defendants' Renewed Motion for Relief., e.g., no motion, of the hundreds of motions filed in this case, has had to be reported on the Court's six month pending motion list despite the fact that this case is only two years old and approximately half of the Court's other cases are *older*. Defendants can rest assured in the fact that the Court has not sat around staring out the window in boredom waiting for the next filing in the *Richie* matter to come in. Nonetheless, the Court will continue its efforts in the future to see that this case gets tried as soon as possible.

[10]See *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11-12 (1976) (antitrust laws are "to be construed liberally, and . . . exceptions . . . are to be construed strictly."); *Federal Maritime Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734-35 (1973) (antitrust laws are "fundamental national policy"); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992).

cannot treat § 2(a)'s phrases - "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" -- as "mere shorthand references" used by Congress, as Defendants urge. Instead, the Court will follow the law as written, i.e., Plaintiff's Sherman Act claim is not subject to dismissal until Defendants have proven that they qualify for the § 2(a) exemption, the same way any other law would be applied. If a Defendant can prove that it meets the new test, the legislative intent is clear that the claim should, and will, be dismissed as to that entity.

To make that determination, however, the Court must first make the necessary subsidiary findings on the factual elements of the exemption, e.g., the Court must determine whether the statutory criteria described in 501(c)(3)[11] are met for each Defendant. On this score, I.R.S. 501(c)(3) determination letters, which are administrative determinations based on information supplied by applicants for such letters, do not necessarily establish that a Defendant is a bona fide organization "described in section 501(c)(3)" and "exempt from taxation under section 501(a)," which in turn would qualify a Defendant to benefit from the new antitrust exemption. *See, e.g., Geisinger Health Plan v. C.I.R.*, 985 F.2d 1210, 1214 (3d Cir. 1993); *Phi Delta Theta Fraternity v. C.I.R.*, 887 F.2d 1302, 1308 (6th Cir. 1989); 16 C.F.R. § 3.82(b) (1995); 1 C.F.R. § 315.306 (1995). The new statute makes no reference at all to an I.R.S. 501(c)(3) determination letter but rather references provisions of the Internal Revenue Code. As such, Defendants bear the burden of proving that they are "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" for the exemption to apply to them, *e.g., Seasongood v. K and*

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[11]Section 50 1 (c)(3) provides for tax exempt status for: "corporations . . . organized and operated exclusively for religious, charitable, . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation . . ."

K Ins. Agency, 548 F. 2d 729, 732 (8th Cir. 1977): self-definition or self-declaration does not pass muster.

Even so, Plaintiff's Fourth Amended Complaint has alleged facts that, if proved, would defeat the new exemption, e.g., Plaintiff has alleged that the American Council on Gift Annuities ("Council"), if it has been determined to be a 501(c)(3) organization, obtained its 501(c)(3) status through material misrepresentations and omissions to the I.R.S. If true, which is how the Court is required to take allegations under a Rule 12(b)(6) motion, the Council would not be entitled to the new antitrust exemption. *Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-77 (1965).

Additionally, if the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception. *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2902-03 (1993). The new exemption in this case has both status-based ("persons described in section 501(c)(3) and exempt from taxation under section 501(a)") and conduct-based ("use or agreeing to use the same annuity rate" for purposes of issuing charitable gift annuities) elements similar to the Capper-Volstead exemption, 7 U.S.C. § 291. Even if the Rule of Forfeiture did not apply (which it does), the new exemption certainly does not exempt or otherwise authorize conspiracies with nonexempt entities.

Consequently, to avoid needless expense and delay to all other Defendants, the Court will decide the Council's exempt status before determining other Defendants' statuses. Therefore, all discovery will remain abated except as to whether the Council is entitled to the new antitrust exemption. If during dispositive motion practice the Council

proves not to be exempt, then class certification issues will be subsequently addressed.[12]

III.

Defendants' contention that "this Court lacks jurisdiction to evaluate Defendants' 501(c)(3) status" is legally incorrect. (Reply at page 3) 26 U.S.C. § 7428,[13] the tax exception to the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201,[14] does

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[12]By Order entered this same day, the Court has decertified all previously certified classes in this case.

[13]26 U.S.C. § 7428 provides in pertinent part as follows:

In a case of actual controversy involving --

> (1) a determination by the Secretary (A) with respect to the initial qualification or continuing qualification of an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2), (B) with respect to the initial classification or continuing classification of an organization as a private foundation . . ., or (C) with respect to the initial classification or continuing classification of an organization as a private operating foundation . . ., or
>
> (2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

. . . , the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial classification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Claims Court, as the cast may be, and shall be reviewable as such. . . .

[14]28 U.S.C. § 2201(a) (the Declaratory Judgment Act) states as follows:

In a case of actual controversy within its jurisdiction, except

not "give exclusive jurisdiction over disputes involving an organization's 501(c)(3) status to the Tax Court, the Claims Court, and the D.C. district court" as Defendants' argue at page nine of their Reply, and this Court does not lack jurisdiction to "de novo review" or otherwise litigate an entity's 501(c)(3) status to determine Defendants' eligibility for this new antitrust exemption. Neither 26 U.S.C. § 7428 nor the DJA, 28 U.S.C. § 2201, are jurisdictional statutes. Section 7428 only involves pre-assessment, pre-collection claims for declaratory relief regarding tax liability and neither creates exclusive jurisdiction nor supplants district court jurisdiction over tax refund actions. *See e.g., American Ass'n of Christian Schools Voluntary Employees Beneficiary Ass'n Welfare Plan Trust v. United States,* 850 F.2d 1510 (11th Cir. 1988) (district court found church insurance trust to not be a 501(c)(3) entity).

More to the point, neither § 7428 nor the DJA are implicated in this case. This is not an action to confer tax liability upon any of the defendants. In enacting § 7428, Congress did not limit jurisdiction to apply the Internal Revenue Code, but only limited jurisdiction to enter certain relief that would interfere with tax collection. This case merely involves a tax-status-related issue that does not implicate tax liability or the assessment and collection of taxes. Moreover, the dispute in this case that is connected with 501(c)(3) classification is to allow the Court to review 501(c)(3) statuses in order to make the subsidiary findings necessary to determine the applicability of the new antitrust exemption. Otherwise, all an antitrust defendant would need do is *allege* the exemption and thus deprive every

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with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, . . . any court of the United States, . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

district court in the country, save one, of antitrust jurisdiction. This clearly is not the law. Accordingly, this Court concludes that it is not divested of subject matter jurisdiction to determine whether the 501(c)(3) and 501(a) elements of Congress's new antitrust exemption are met. *See Stern & Co. v. State Loan & Fin. Corp.*, 205 F. Supp. 702 (D. Del. 1962); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

Although Defendants assert that *Youngblood v. FDIC*, 29 F.3d 225, 228-29 (5th Cir. 1994), requires federal courts to defer to I.R.S. determination letters, that case is distinguishable in several important aspects from the instant case. The issue in *Youngblood* was whether the Texas legislature contemplated that its own courts would independently determine whether a retirement plan is "qualified" under the Internal Revenue Code, especially when the I.R.S. had made a contrary determination. The Fifth Circuit reasoned that the state legislature likely did not intend for conflicts to develop between state courts and the I.R.S. in such a complex, specialized area of federal law, noting state court inexperience with federal tax matters. *Youngblood* involved a bankruptcy court's application of a state statute that referred to federal law, not the interpretation of federal law by an Article III court, and did not address I.R.S. determination letters with respect to 501(c)(3) status.

IV.

Defendant Lutheran Foundation of Texas's October 26, 1995 Motion to Reconsider the May 3, 1995 Order Granting Partial Summary Judgment, *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D.Tex. 1995), is **DENIED**. Soon after the Court's May 3, 1995 Order, the Texas Legislature, on May 23, 1995 and June 16, 1995, "clarified" that the provisions in the Texas Insurance Code, Texas Deceptive Trade Practices Act, Texas Banking Code, and Texas Non-Profit Corporation Act that existed when

this lawsuit was filed provided no basis for any of Plaintiff's Texas statutory claims. The Texas Legislature explicitly stated that it was not changing the laws undergirding the May 3, 1995 Order, but merely "clarifying" them. The Court considers the Texas Legislature's "clarifications" irrelevant.

Again, the Court is bound by what the Legislature said. As it stands, "clarifications" of pre-existing law (as the new state amendments refer to themselves) cannot serve as a basis for reconsideration of the Court's Order since they did not expressly state that they wanted to retroactively change pre-existing law. The Court presumes every word was used for a reason and that every word not chosen was excluded for a reason. Absent a clear and unambiguous expression that Texas statutes on which the Court's May 3, 1995 Order was based, are retroactively changed, these "clarifications" are meaningless.

Construction of prior law is the sole prerogative of the courts. *Central Bank of Denver v. First Interstate Bank of Denver,* 114 S. Ct. 1439, 1452 (1994); *Federal Crude Oil v. Yount-Lee Oil Co.*, 52 S.W. 2d 56, 63 (Tex. 1932); *Amplifone Corp. v. Cameron County,* 577 S.W. 2d 567, 570 (Tex. Civ. App. -- Corpus Christi 1979, no writ). The Court finds no cases which even remotely suggest that courts may or should abdicate their judicial responsibility to a lawmaking body. The Court also finds no cases which suggest that the judiciary is bound, when the Legislature declares that a prior law said "red," to give effect to a subsequent Legislature's "clarification" that the law should be construed to say "green," which is exactly the argument advanced by Defendants' Motion to Reconsider. Clearly, addition of such new specific exemptions from broad statutes does precisely that when they directly contradict the plain wording of the prior statutes, as they do in this instance. Insofar as it makes a contrary interpretation, the Court considers any persuasive or non-controlling state law authority on this issue (of which the Court is only aware of two state trial court opinions) to be unpersuasive.

Accordingly, Defendant Lutheran Foundation of Texas's and Defendant Lutheran Church-Missouri Synod's October 26, 1995 Motion for Partial Summary Judgment seeking declarations contrary to the foregoing and Defendant American Council on Gift Annuities's and Defendant Lutheran Church-Missouri Synod's November 22, 1995 Motion for Partial Summary Judgment are **DENIED**.

* * *

For these reasons, Defendants' Motion to Dismiss and Renewed Motion for Relief are **GRANTED** as to Plaintiff s Investment Company Act of 1940 claim and as to Plaintiff's Texas Free Enterprise and Antitrust Act claim; are **DENIED** as to Plaintiff's Sherman Act claim; and are **DENIED** as to Plaintiff's state-law claims.

SO ORDERED this 30th day of September, 1996.

S/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

ORDER OF THE COURT OF APPEALS DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-11332 & 96-11439

DOROTHY L. OZEE, Acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T. Peter, on behalf of Louise T. Peter individually and all others similarly situated, ET AL.

Plaintiffs

BOYD L. RICHIE, Guardian of the Estate of Louise T. Peter

Plaintiff - Appellee

v.

THE AMERICAN COUNCIL OF GIFT ANNUITIES, INC., individually and on behalf of its members, sponsors and all others similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association; THE LUTHERAN CHURCH-MISSOURI SYNOD; LUTHERAN CHURCH MISSOURI SYNOD TEXAS DISTRICT; LUTHERAN FOUNDATION OF TEXAS; GRAY, PLANT, MOOTY, MOOTY AND BENNETT; SALVATION ARMY, A New York Corporation; SALVATION ARMY, An Illinois Corporation; SALVATION ARMY, A California Corporation; SALVATION ARMY, A Georgia Corporation; THE LUTHERAN CHURCH MISSOURI SYNOD FOUNDATION; BAPTIST FOUNDATION OF TEXAS, on behalf of themselves and all others similarly situated; SOUTHERN BAPTIST CONVENTION; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, doing business as General Conference of Seventh-Day Adventists; ANDERSON UNIVERSITY, doing business as Anderson University; MOUNT HOLYOKE COLLEGE; GOOD SHEPHERD

HOME FOUNDATION; NORTHWESTERN UNIVERSITY; AMERICAN BAPTIST FOUNDATION; LOMA LINDA UNIVERSITY; SMITH COLLEGE; UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER; UNITED CHURCH OF CHRIST; PLANNED GIVING SERVICES, INC, doing business as Planned Giving Services, Inc; PLANNED GIVING RESOURCES; HAY-HUGGINS COMPANY, INC; PRERAU & TEITELL; VASSAR COLLEGE; AMERICAN BAPTIST FOREIGN MISSION SOCIETY; ST. OLAF COLLEGE; WITTENBERG UNIVERSITY; EVANGELICAL LUTHERAN CHURCH IN AMERICA; AMERICAN BIBLE SOCIETY; THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a Moody Bible Institute; AMERICAN LEPROSY MISSIONS, INC.

Defendants - Appellants

DAN MORALES

Appellant

In Re: AMERICAN COUNCIL ON GIFT ANNUITIES, INC., ET AL.

Petitioners.

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas, Wichita Falls

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/9/97, 5 Cir., , F.3d)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-11332

D. C. Docket No. 7:94-CV-128-X

DOROTHY L. OZEE, Acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T. Peter, on behalf of Louise T. Peter individually and all others similarly situated, ET AL.

Plaintiffs

BOYD L. RICHIE, Guardian of the Estate of Louise T. Peter

Plaintiff - Appellee

v.

THE AMERICAN COUNCIL OF GIFT ANNUITIES, INC., individually and on behalf of its members, sponsors and all others similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association; THE LUTHERAN CHURCH-MISSOURI SYNOD; LUTHERAN CHURCH MISSOURI SYNOD TEXAS DISTRICT; LUTHERAN FOUNDATION OF TEXAS; GRAY, PLANT, MOOTY, MOOTY AND BENNETT; SALVATION ARMY, A New York Corporation; SALVATION ARMY, An Illinois Corporation; SALVATION ARMY, A California Corporation; SALVATION ARMY, A Georgia Corporation; THE LUTHERAN CHURCH MISSOURI SYNOD FOUNDATION; BAPTIST FOUNDATION OF TEXAS, on behalf of themselves and all others similarly situated; SOUTHERN BAPTIST CONVENTION; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, doing business as General Conference of Seventh-Day Adventists; ANDERSON UNIVERSITY, doing business as Anderson University;

MOUNT HOLYOKE COLLEGE; GOOD SHEPHERD HOME FOUNDATION; NORTHWESTERN UNIVERSITY; AMERICAN BAPTIST FOUNDATION; LOMA LINDA UNIVERSITY; SMITH COLLEGE; UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER; UNITED CHURCH OF CHRIST; PLANNED GIVING SERVICES, INC, doing business as Planned Giving Services, Inc; PLANNED GIVING RESOURCES; HAY-HUGGINS COMPANY, INC; PRERAU & TEITELL; VASSAR COLLEGE; AMERICAN BAPTIST FOREIGN MISSION SOCIETY; ST. OLAF COLLEGE; WITTENBERG UNIVERSITY; EVANGELICAL LUTHERAN CHURCH IN AMERICA; AMERICAN BIBLE SOCIETY; THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a Moody Bible Institute; AMERICAN LEPROSY MISSIONS, INC.

Defendants - Appellants

DAN MORALES

Appellant

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls.

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order denying Morales's motion to intervene as of right is REVERSED and this cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court Richie's motion is GRANTED and defendants' and Northwestern's appeals accordingly are DISMISSED.

Pursuant to Rule 38, the defendants and Northwestern are SANCTIONED $15,000 for their frivolous appeals and are hereby ORDERED to remit that sum to Richie.

IT IS FURTHER ORDERED that costs on appeal are to be taxed against all appellants except Dan Morales.

ISSUED AS MANDATE: Jun 16, 1997

ORDER OF THE COURT OF APPEALS DENYING MOTION TO STAY MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-11332 & 96-11439

DOROTHY L. OZEE, Acting individually as attorney in fact for Louise T. Peter, and as next friend for Louise T. Peter, on behalf of Louise T. Peter individually and all others similarly situated, ET AL

Plaintiffs

BOYD L. RICHIE, Guardian of the Estate of Louise T. Peter

Plaintiff - Appellee

v.

THE AMERICAN COUNCIL OF GIFT ANNUITIES, INC., individually and on behalf of its members, sponsors and all others similarly situated to them, and as successor to The Committee on Gift Annuities, an unincorporated association; THE LUTHERAN CHURCH-MISSOURI SYNOD; LUTHERAN CHURCH MISSOURI SYNOD TEXAS DISTRICT; LUTHERAN FOUNDATION OF TEXAS; GRAY, PLANT, MOOTY, MOOTY AND BENNETT; SALVATION ARMY, A New York Corporation; SALVATION ARMY, An Illinois Corporation; SALVATION ARMY, A California Corporation; SALVATION ARMY, A Georgia Corporation; THE LUTHERAN CHURCH MISSOURI SYNOD FOUNDATION; BAPTIST FOUNDATION OF TEXAS, on behalf of themselves and all others similarly situated; SOUTHERN BAPTIST CONVENTION; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, doing business as General Conference of Seventh-Day Adventists; ANDERSON UNIVERSITY, doing business as Anderson University; MOUNT HOLYOKE COLLEGE; GOOD SHEPHERD

HOME FOUNDATION; NORTHWESTERN UNIVERSITY; AMERICAN BAPTIST FOUNDATION; LOMA LINDA UNIVERSITY; SMITH COLLEGE; UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER; UNITED CHURCH OF CHRIST; PLANNED GIVING SERVICES, INC, doing business as Planned Giving Services, Inc; PLANNED GIVING RESOURCES; HAY-HUGGINS COMPANY, INC; PRERAU & TEITELL; VASSAR COLLEGE; AMERICAN BAPTIST FOREIGN MISSION SOCIETY; ST. OLAF COLLEGE; WITTENBERG UNIVERSITY; EVANGELICAL LUTHERAN CHURCH IN AMERICA; AMERICAN BIBLE SOCIETY; THE MOODY BIBLE INSTITUTE OF CHICAGO, d/b/a Moody Bible Institute; AMERICAN LEPROSY MISSIONS, INC.

Defendants - Appellants

DAN MORALES

Appellant

In Re: AMERICAN COUNCIL ON GIFT ANNUITIES, INC., ET AL.,

Petitioners.

Appeals from the United States District Court for the Northern District of Texas, Wichita Falls

Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas, Wichita Falls

ORDER:

(X) The motion of Baptist Foundation of Texas, Southern Baptist Convention, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, American Baptist Foundation, Loma Linda University, American Baptist Foreign Mission

in America, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, The American Bible Society, American Leprosy Missions Inc., The American Council on Gift Annuities Inc. Individually and as Successors to the Committee on Gift Annuities, an Unincorporated Association, Anderson University Inc. d/b/a Andeson University, Mount Holyoke College, St Olaf College, Smith College, Vassar College, and Wittenberg University for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Baptist Foundation of Texas, Southern Baptist Convention, General Conference Corporation of Seventh-Day Adventists d/b/a General Conference of Seventh-Day Adventists, American Baptist Foundation, Loma Linda University, American Baptist Foreign Mission in America, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, The American Bible Society, American Leprosy Missions Inc., The American Council on Gift Annuities Inc. Individually and as Successors to the Committee on Gift Annuities, an Unincorporated Association, Anderson University Inc. d/b/a Andeson University, Mount Holyoke College, St Olaf College, Smith College, Vassar College, and Wittenberg University for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

S/Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

STATUTORY PROVISIONS AND RULE INVOLVED

28 U.S.C. § 1291 provides, in relevant part, that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, provides, in relevant part:

> SEC. 2. IMMUNITY FROM ANTITRUST LAWS.
>
> (a) INAPPLICABILITY OF ANTITRUST LAWS. - Except as provided in subsection (d), the antitrust laws, and any State law similar to any of the antitrust laws, shall not apply to charitable gift annuities or charitable remainder trusts.
>
> (b) IMMUNITY. - Except as provided in subsection (d), any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws, or any State law similar to any of the antitrust laws, on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for the conduct set forth in this subsection.

(c) TREATMENT OF CERTAIN ANNUITIES AND TRUSTS. - Any annuity treated as a charitable gift annuity, or any trust treated as a charitable remainder trust, either --

(1) in any filing by the donor with the Internal Revenue Service; or

(2) in any schedule, form, or written document provided by or on behalf of the donee to the donor;

shall be conclusively presumed for the purposes of this Act to be respectively a charitable gift annuity or a charitable remainder trust, unless there has been a final determination by the Internal Revenue Service that, for fraud or otherwise, the donor's annuity or trust did not qualify respectively as a charitable gift annuity or charitable remainder trust when created.

(d) LIMITATION. - Subsections (a) and (b) shall not apply with respect to the enforcement of a State law similar to any of the antitrust laws, with respect to charitable gift annuities, or charitable remainder trusts, created after the State enacts a statute, not later than December 8, 1998, that expressly provides that subsections (a) and (b) shall not apply with respect to such charitable gift annuities and such charitable remainder trusts.

Pub.L. No. 105-26, 111 Stat. 241 (1997).

FED. R. CIV. P. 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

EXCERPTS FROM RESPONDENT'S FOURTH AMENDED CLASS ACTION COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BOYD L. RICHIE, as Guardian of the Estate of LOUISE T. PETER, on behalf of LOUISE T. PETER individually and on behalf of all others similarly situated,	§	
Plaintiff,	§	
vs.	§	Civil Action No. 7:94-CV-128-V
THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., individually, and as successor to THE COMMITTEE ON GIFT ANNUITIES, an unincorporated association; THE LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN CHURCH-MISSOURI SYNOD FOUNDATION, THE TEXAS DISTRICT OF THE LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN FOUNDATION OF TEXAS, CONCORDIA LUTHERAN COLLEGE, BAPTIST FOUNDATION OF TEXAS, GRAY, PLANT, MOOTY, MOOTY & BENNETT, AMERICAN BIBLE SOCIETY, SOUTHERN BAPTIST CONVENTION, UNITED WAY OF AMERICA, THE MOODY BIBLE INSTITUTE OF CHICAGO d/b/a MOODY BIBLE INSTITUTE, GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, d/b/a GENERAL CONFERENCE OF SEVENTH-DAY	§	(Class Action)

ADVENTISTS, ANDERSON UNIVERSITY, INC. d/b/a ANDERSON UNIVERSITY, MOUNT HOLYOKE COLLEGE, GOOD SHEPHERD HOME FOUNDATION, NORTHWESTERN UNIVERSITY, AMERICAN BAPTIST FOUNDATION, LOMA LINDA UNIVERSITY, SMITH COLLEGE, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER, THE SALVATION ARMY, A NEW YORK CORPORATION, THE SALVATION ARMY, A CALIFORNIA CORPORATION, THE SALVATION ARMY, AN ILLINOIS CORPORATION, UNITED CHURCH OF CHRIST, AMERICAN LEPROSY MISSIONS, INC., PLANNED GIVING SERVICES, INC. d/b/a PLANNED GIVING SERVICES, PLANNED GIVING RESOURCES, HAY/HUGGINS COMPANY, INC., PRERAU & TEITELL, VASSAR COLLEGE, AMERICAN BAPTIST FOREIGN MISSION SOCIETY, ST. OLAF COLLEGE, WITTENBERG UNIVERSITY EVANGELICAL LUTHERAN CHURCH IN AMERICA, DESERET TRUST COMPANY, FIDUCIARY TRUST COMPANY INTERNATIONAL, STATE STREET BANK & TRUST COMPANY OF CALIFORNIA, N.A., GREAT AMERICAN LIFE INSURANCE COMPANY, INSURANCE PARTNERS SOUTHWEST, FLEET INVESTMENT SERVICES, INC., NORWEST BANK MINNESOTA, N.A., NEW YORK LIFE INSURANCE & ANNUITY CORPORATION, PRUDENTIAL SECURITIES, FIFTH THIRD BANK, HAWKEYE §

BANCORPORATION, HIBERNIA NATIONAL BANK, NATIONSBANK OF TEXAS, N.A., NORWEST BANK OF EL PASO, GERALD BRYAN KIESCHNICK, GLENN PITTSFORD, ESTATE OF CARL A. HECKMANN, FRED A. BLEEKE, and GLENN O'SHONNEY,	§ § § § § § § § §
Defendants.	§

FOURTH AMENDED CLASS ACTION COMPLAINT

Plaintiff Boyd L. Richie, as guardian of the estate of Louise T. Peter, on behalf of Louise T. Peter and all others similarly situated (the "Plaintiff"), brings this action against:

(a) The American Council on Gift Annuities, Inc. (the "Council"), individually and as successor to the Committee on Gift Annuities, an unincorporated association;

(b) Certain of the Council's sponsors and their affiliates (the "Sponsor Defendants"), including:

(1) The Lutheran Church-Missouri Synod (the "Synod"), The Lutheran Church Missouri Synod Foundation (the "Synod Foundation"), The Texas District Lutheran Church-Missouri Synod (the "Texas Synod"), The Lutheran Foundation of Texas (the "Texas Lutheran Foundation"), Concordia Lutheran College ("Concordia") (the preceding organizations being sometimes hereinafter collectively referred to as the "Lutheran Organizations"), Baptist Foundation of Texas; Gray, Plant, Mooty, Mooty & Bennett, American Bible Society, Southern Baptist Convention, United Way of America, The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, General Conference Corporation of

Seventh-day Adventists d/b/a General Conference of Seventh-day Adventists, Anderson University, Inc. d/b/a Anderson University, Mount Holyoke College, Good Shepherd Home Foundation, Northwestern University, American Baptist Foundation, Loma Linda University, Smith College, University of Colorado Health Sciences Center, the Salvation Army, United Church of Christ, American Leprosy Missions, Inc., Planned Giving Services, Inc. d/b/a Planned Giving Services, Planned Giving Resources, Hay/Huggins Company, Inc., Prerau & Teitell, Vassar College, American Baptist Foreign Mission Society, St. Olaf College, Wittenberg University, Evangelical Lutheran Church in America, (the organizations listed in this paragraph being sometimes hereinafter collectively referred to as the "CGA Defendants");[15]

(2) Deseret Trust Company, Fiduciary Trust Company International, State Street Bank & Trust Company of California, N.A., Great American Life Insurance Company, Insurance Partners Southwest, Fleet

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[15] The Texas Lutheran Foundation; the Synod; the Synod Foundation; the American Leprosy Mission; The Salvation Army, an Illinois Corporation; The Salvation Army, a Georgia Corporation; The Salvation Army, a New York Corporation; The Salvation Army, a California Corporation; Good Shepherd Home Foundation; Baptist Foundation of Texas; United Church of Christ; American Bible Society; University of Colorado; Northwestern University; Evangelical Lutheran Church of America; American Baptist Foreign Missions Society; Southern Baptist Convention; Anderson University; Mount Holyoke College; St. Olaf College; Smith College; Vassar College; and Moody Bible Institute of Chicago are hereinafter collectively referred to as the "Annuity Defendants."

The Texas Foundation; the Synod; the General Conference Corporation of Seventh-day Adventists; The Salvation Army, a Georgia Corporation; The Salvation Army, a California Corporation; Baptist Foundation of Texas; and Northwestern University are hereinafter collectively referred to as the "Trust Defendants."

Investment Services, Norwest Bank Minnesota, N.A., New York Life Insurance & Annuity Corporation, Prudential Securities, Fifth Third Bank, Hawkeye Bancorporation, Hibernia National Bank, NationsBank of Texas, N.A., and Norwest Bank El Paso (the organizations listed in this paragraph will be referred to collectively as the "Commercial Defendants");

and

(c) Gerald Bryan Kieschnick, Glenn Pittsford, Estate of Carl A. Heckmann, Fred A. Bleeke, and Glenn O'Shonney (collectively, the "Individual Defendants"), and

would respectfully show the Court the following:

NATURE OF THE ACTION

1. As set forth below, the Council, the CGA Defendants and the Commercial Defendants have violated the antitrust laws of the United States and the State of Texas by engaging in illegal price fixing of the rates of return on charitable gift annuities. Their anticompetitive conduct has injured interstate trade and commerce and has resulted in severe financial harm to Plaintiff and the plaintiff antitrust class members in the form of receiving less income than they would have received in a competitive environment.

* * *

5. The class claims are prosecuted by three plaintiff classes, as well as one individual. One of the plaintiff classes consists of persons injured in their business or property as a result of the violations of state and federal antitrust laws. . . .

6. The class claims are prosecuted against the CGA Defendants who have committed the unlawful acts described

herein. The antitrust claims of the Plaintiff Antitrust Class (as defined below) are also prosecuted against the Council, the CGA Defendants, and the Commercial Defendants as the orchestrators and enforcers of the illegal price-fixing conspiracy.

THE PARTIES

7. Louise T. Peter ("Peter") is an individual currently residing in Wichita County, Texas. Peter has owned charitable gift annuities and is the settlor and beneficiary of charitable trusts established with some members of the defendant classes in the class period. Plaintiff Boyd L. Richie (the "Guardian") is the duly-appointed lawful guardian of the estate of Louise T. Peter.

* * *

JURISDICTION AND VENUE

12. Pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, this action is for damages and injunctive relief for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. This action also arises under the common law and statutes of the State of Texas. This Court has jurisdiction over this action pursuant to 15 U.S.C. § 15 and 28 U.S.C. §§ 1331, 1337(a), and 1367.

13. Venue is proper in this district under 15 U.S.C. § 22 and 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to the claims occurred in this district. The Council and the Baptist Foundation maintain their headquarters and regularly transact their business in the Northern District of Texas. All defendants have transacted business or committed torts or other wrongs, in whole or in part, within the State of Texas.

PLAINTIFF CLASS ACTION ALLEGATIONS

14. Pursuant to Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure, the Plaintiff brings these actions on behalf of the following classes:

Plaintiff Antitrust Class

15. With respect to the collusive fixing of the rates of return on charitable gift annuities by the Council, the CGA Defendants, and the Commercial Defendants, the Plaintiff brings claims under Section 1 of the Sherman Act on behalf of all persons in the United States who, from December 30, 1990 until the present, owned charitable gift annuities or other life income products sold by the CGA Defendants and the Council or its predecessors (including the affiliates of all such past or present members or sponsors of the Council or its predecessors) pursuant to rates of return published by the Council (the "Plaintiff Antitrust Class").

* * *

18. Excluded from each of the above plaintiff classes are the named Defendants, any other persons, firm, trust, corporation or other entity related to or affiliated with the such persons, including employees and agents of such persons and members of the immediate families of such employees and agents.

RULE 23(a) PREREQUISITES

19. Prosecution of the claims of the Plaintiff Antitrust Class, Plaintiff Annuity Class, and Plaintiff Trust Class as a class action is appropriate because the prerequisites of Rule 23 of the Federal Rules of Civil Procedure are met. While the number of members of each plaintiff class cannot be exactly determined at this time and is within the knowledge and control of the Council and the CGA Defendants, information obtained in discovery confirms that

there are hundreds, if not thousands, of members in each class. The Plaintiff Antitrust Class numbers in excess of 15,200 persons. The Plaintiff Annuity Class numbers in excess of 500 persons, and the Plaintiff Trust Class numbers in excess of 300 persons. The members of each class are therefore so numerous that joinder would be impracticable.

Plaintiff Antitrust Class

20. There is a well-defined community of interest in the questions of law and fact affecting the members of the Plaintiff Antitrust Class. The questions of law and fact common to the class members include, but are not limited to, the following:

a. Whether the Council, the CGA Defendants, and the Commercial Defendants entered into contracts, combinations, or conspiracies to fix the rates of return on charitable gift annuities;

b. Whether the CGA Defendants followed rates promulgated by the Council;

c. Whether such contracts, combinations, or conspiracies are illegal under federal antitrust laws;

d. Whether the members of the Plaintiff Antitrust Class suffered antitrust injury and have suffered injury to their business or property as a result of the illegal price fixing; and

e. The measure and extent of the resulting damages to the members of the Plaintiff Antitrust Class.

* * *

23. The Plaintiff's claims are typical of the claims of the members of each of the Plaintiff Antitrust, Plaintiff Annuity, and Plaintiff Trust Classes. The Plaintiff's claims

fairly encompass the claims of the members of those classes. The Plaintiff and the members of each of the plaintiff classes are similarly or identically harmed by the same systematic and pervasive pattern of illegal conduct by the Council, the CGA Defendants, and the Commercial Defendants. The plaintiff classes' injuries result from conspiracies and concerted schemes by, between, and among the Council, the CGA Defendants, and the Commercial Defendants. As set forth more fully below, by and through the Council and other means, the Council, the CGA Defendants, and the Commercial Defendants have conspired and agreed to engage in the acts complained of herein. The Council, the CGA Defendants, and the Commercial Defendants are tied together by common sponsorship of the Council and other joint activities, such as the Charitable Accord, and help the Council, the CGA Defendants and the Commercial Defendants to establish and implement the unlawful policies and practices that are applied in a common manner to the plaintiff classes.

24. All members of the plaintiff classes are injured in their business or property by reason of the unlawful conduct of the Council, the CGA Defendants and the Commercial Defendants alleged herein. As purchasers of charitable gift annuities, all members of the Plaintiff Antitrust Class have received artificially low annuity payments pursuant to illegally set maximum gift annuity rates. . . .

25. The Plaintiff and his counsel will fairly and adequately protect the interests of the members of the classes. There are no material conflicts between the claims of the Plaintiff and the members of any of the classes that would make class certification inappropriate. Counsel for the classes will vigorously assert the claims of the members of the classes.

RULE 23(b) PREREQUISITES

26. In addition, the prosecution of the claims of the Plaintiff Antitrust Class as a class action pursuant to Rules 23(b)(3) is appropriate . . . .

* * *

28. The questions of law or fact common to the members of the plaintiff classes predominate over any questions affecting only their individual members. The Plaintiff will be able to demonstrate a viable method for proving common impact and damages to the members of each of the classes.

29. With respect to the Plaintiff Antitrust Class, the Plaintiff will demonstrate that, absent the fixing of maximum rates of return on charitable gift annuity rates, the rates of return paid by the CGA Defendants with respect to charitable gift annuities would have risen to competitive levels for charitable gift annuities. The damages suffered by each member of the Plaintiff Antitrust Class will be the difference between the competitive rates of return and the illegal maximum rate of return applicable to that member pursuant to the Uniform Annuity Rates published by the Council.

* * *

31. A class action is superior to other methods for the fair and efficient resolution of the controversy.

FACTS

32. This lawsuit is brought on behalf of purchasers of several investment products sold by nonprofit organizations. These purchasers were victimized by charities that conspired to fix the rate of return on charitable annuities and performed other illegal acts in violation of Texas and

federal law. Plaintiff's antitrust claims challenge an illegal nationwide scheme to fix the rates of return on annuities sold by nonprofit organizations to thousands of unwitting persons. The Council acknowledges that these annuities are purchased from nonprofit organizations by persons who need to make some provision for lifetime income. As a result of the illegal price-fixing scheme, however, the annuitants—who are mostly elderly women with an average age of approximately 77 years old—end up being deprived of the higher rates of return that would otherwise be available in a competitive market. . . .

Charitable Investment Products

33. Fundraising by the nonprofit sector has become a huge industry. Nonprofit organizations are financed by gifts, debt, and fees charged for their financial management services. When nonprofit organizations choose to raise money through debt financing, or go into the business of providing income for private citizens, they cross into the realm of commerce. In both form and substance, certain members of the nonprofit sector are actively marketing investment products, thereby implicating important social policies such as the prohibition against price-fixing and investor protection.

Annuities

34. A charitable gift annuity is an arrangement pursuant to which a person (an "annuitant") transfers money or other property to an organization eligible to receive charitable deductions in exchange for a promise by the organization to pay an annuity to the annuitant. An annuity is a fixed sum payable in annual or more frequent installments over the life or lives of the annuitants. An annuitant is a general creditor of the charity, and if the charity does not reserve the annuity amount, the annuitants are at risk should the charity's investments do poorly. A person who purchases a charitable gift annuity has two

goals: to secure a fixed source of income for the annuity period and to make a gift to the charitable organization. Thus, under IRS regulations, the transaction is treated, in part, as the purchase of an annuity and, in part, as a charitable contribution. Income earned on the annuity is taxed to the annuitant as ordinary income.

35. Charitable gift annuities are actively marketed and sold by charitable organizations as a means of providing an annuitant with a fixed stream of investment income and the opportunity to make a tax-deductible charitable donation. For example, one charity has run advertisements in a national publication offering to "pay you an income for life" with a rate of return ranging from 5.5% to 11% per annum. A true and correct copy of this advertisement is attached hereto as Exhibit A and incorporated herein by reference. As is recognized in literature prepared by the Council, often the annuitant cannot afford to make outright gifts to charitable organizations of its choice, and therefore chooses to purchase a charitable gift annuity to ensure income that the annuitant needs for living expenses. A true and correct copy of that literature is attached hereto as Exhibit B and incorporated herein by reference.

36. A prominent spokesman for charities with respect to annuities and trusts is the Vice President and Trust Counsel for the Baptist Foundation of Texas (the "Council's Spokesman"). The Baptist Foundation of Texas is one of the principal sponsors of the Council. The Council's Spokesman is also a spokesman and lobbyist for the Charitable Accord and has given testimony on the subject matter of this lawsuit before the Texas legislature. A true and correct copy of relevant portions of an article by the Council's Spokesman and related materials is attached hereto as Exhibit C and incorporated herein by reference.

37. The sponsors of the Council have issued thousands of these charitable gift annuities. In fact, according to the 1994 Survey of Council Sponsors and other

organizations (the "1994 Survey"), over 80,000 annuity contracts are in force with 783 of the over 1,400 Council sponsors.

38. A charitable annuity is actuarially structured so that the charity receives a residual if the annuitant lives to full life expectancy. Nevertheless, a charitable gift annuity transaction is based upon a pure mathematical equation analogous to the type of calculation done by issuers of commercial annuities. An annuitant determines what payment level it would like and, absent price-fixing, the charity determines what percentage profit it is willing to accept on the transaction, *i.e.*, what percentage of the money paid to the charity it desires to retain after the death of the annuitant. In a competitive market, the life expectancy of the annuitant, the earnings the charity estimates it can make investing the money, the rate of return to the annuitant (as determined by competitive forces), and the residual percentage are part of an equation resulting in the calculation of the purchase price for the annuity. Until the annuitant dies, the charity has the use of the full transfer to it and a general liability to the annuitant. According to the Council's Spokesman, annuitants become general creditors of the charity upon executing an annuity contract. In addition, charities charge fees and expenses as consideration for the service of administering the annuity.

39. The amount of money used and paid by the charity is entirely independent of the tax treatment given the transaction with respect to an individual annuitant. Under the Internal Revenue Code, a tax deduction is available for a portion of the transfer to the charity if the annuitant wishes to take it. The remaining portion is considered an ordinary annuity for tax purposes, and income on the annuity is taxed exactly as if the annuitant had purchased the annuity from a commercial seller of annuities.

40. Charitable gift annuities are marketed and sold in trade and commerce in competition with each other and

with commercial investment opportunities. According to the Council's Spokesman, prospective annuitants often have under consideration a number of institutions as candidates with which to invest their money. In order to persuade a prospective annuitant that it should accept the lower return offered by a charitable annuity, charities emphasize as tradeoffs favorable tax considerations, charitable deductions, and the intangible value of making a gift to charity. Charities tout the merits of their products versus the products of other charities by, for example, making representations about the financial size and stability of the charity. Because of the anticompetitive conduct alleged below, however, charities in competition with each other have not been forced to compete on the basis of the rates of return offered by charities, which they otherwise would be forced to do.

* * *

The Web of the Council and Its Sponsors

42. The Council is a nonprofit corporation formed for the purpose of fixing maximum gift annuity rates. The Council is the successor to organizations that have existed in different forms at different times as unincorporated associations, including the Committee on Gift Annuities (the "Committee") (the Council and its predecessors shall hereinafter be referred to as the "Council"), all of which existed for, and performed, the same or similar functions as the Council. According to an authorized history of the Committee, the Committee was formed because it had become "clear that one organization could raid another's [annuity] constituency if the rates offered were attractive enough." As a result, a group of nonprofit organizations banded together to declare "that henceforth the competition among Gift Annuity issuers was to be limited to the cause represented and not be related in any way to the annuity payment offered."

43. In 1993, the Committee on Gift Annuities incorporated into its present form as the Council and continued the activities of the Committee on Gift Annuities. Indeed, the Council's Articles of Incorporation provide that one of the purposes of the organization is "developing recommended maximum gift annuity rates." Over time, the number of organizations sponsoring this pricing-fixing conspiracy increased exponentially. The cartel expanded its influence into illegal activities concerning charitable trusts.

44. For example, the Council holds conferences and workshops regarding how to set up charitable trusts and the nature of state regulation concerning charitable organizations. The Council also actively schools its sponsors in avoiding detection of their activities by state regulators. Council speakers and publications repeatedly harp on the theme that sponsors should conceal their activities from state regulators. Additionally, the Council has a network of members who advise sponsors regarding the applicable state laws. Thus, a substantial purpose of the Council is to prevent price competition and otherwise aid nonprofit organizations to violate the law with impunity.

45. The other named defendant organizations are part of this illegal enterprise. Nonprofit organizations often set up separate entities to operate their fundraising and money businesses. For example, the Texas Lutheran Foundation is an agency of the Texas Lutheran Church, which is an affiliate of the Synod. The Synod, in turn, set-up the Synod Foundation, which represents the Synod and its affiliates on the Council.

The Council Is Not a Bona Fide Section 501(c)(3) Organization

46. In 1993, the Council received a Section 501(c)(3) determination letter from the IRS. Despite receiving this recognition by the IRS, the Council does not qualify for such designation. The Council's purposes and functions go well

beyond any purported educational or charitable purpose, thus placing the Council outside the description of an organization under Section 501(c)(3) of the Internal Revenue Code. As described above, the Council's primary purpose has always been to suppress competition.

47. In addition to its primary purpose of suppressing competition among issuers of charitable gift annuities, the Committee and the Council have also engaged in extensive efforts to monitor state and federal regulators and to lobby state and federal law makers. The Constitution of the Committee stated: "The Committee shall ascertain and report as to legislation in the United States and in the various states regarding gift annuities, their taxability, et cetera." In 1977, the Committee formed a Subcommittee on State Regulation to monitor state regulations of gift annuities and pooled income funds.

48. The Council has been involved in drafting proposed legislation affecting charitable gift annuities and other similar investment products. In 1993, the Council sponsored proposed legislation titled "People's Charitable Giving Act of 1993" designed to amend certain provisions of the Tax Code. Moreover, the Council created a national task force on state legislation/regulation of gift annuities in 1994. Finally, as a result of the Council's activities, numerous states have declared the Council's rates to be actuarially sound.

49. In addition to monitoring the activities of state regulators, the Council also instructs its sponsors on ways to avoid compliance with state laws. The Council advises sponsors not to contact state regulators with questions regarding gift annuities or other related issues. The Council has instructed its sponsors: "Do not set your attorney or legal counsel loose to contact one or all of the state regulators . . . . The worst thing we can do, individually or collectively, is to have counsel for a few or many charities inquire of state regulators about the need to file with them."

The Council further warned sponsors, "if you ask a question of a regulator, and identify your organization in the process, you must comply with the answer you receive. Be aware that other charities who have not asked or identified themselves will not be complying with the answer you received."

50. In order to facilitate its expressed purpose of suppressing competition, the Council actively works to enforce its rates through pressure, intimidation and deception. The Committee and the National Conference of Churches resolved in 1958 that the NCC would limit its gift annuity discussions to meeting promotional needs, leaving the Committee to be responsible for annuity rates and supervision.

51. The Council monitors sponsors' compliance with the uniform maximum rates of return through surveys among sponsors. The Council has punished sponsors who did not comply with the Council's recommended rates by excluding noncomplying members from full participation in the Council. Wheaton College in Illinois, the Catholic Church Extension of Chicago, and Moody Bible Institute of Chicago were excluded from serving on the Council's Resolutions Committee because they did not adhere to the Council's rates.

52. The Council applied pressure tactics and deception against charities who deviated from the uniform maximum annuity rates by offering rates higher than those recommended by the Council. In responding to the offer of annuities by the UJA with rates higher than those adopted by the Council, the Council falsely told the UJA: "The insurance law of some of these regulated states even specify that your rates may not exceed the current American Council's rates."

53. In order to increase the number of its dues paying sponsors, the Council has used deception to induce

organizations to join the Council. During recent Congressional debates over legislation designed to exempt certain 501(c)(3) tax exempt organizations from certain antitrust and securities laws, Congressman Richardson submitted a letter from an organization which joined the Committee "because we were told that the Securities and Exchange Commission and the United States Treasury Department utilized the Committee to ensure that charities were properly trained and equipped to issue and administer charitable gift annuities to their donors." In fact, such government agencies do not "utilize" the Council in any manner.

54. Finally, the Council provides other actuarial and administrative services to its sponsors. The Council engages actuaries to determine the uniform maximum rates recommended to issuers of gift annuities and other life income products. The Council has also advised sponsors against obtaining reinsurance for the annuities or other products sold by sponsors. The Council has obtained discounts on software programs available to charities for use in connection with the investments sold by the sponsors.

55. The Council also engages in propaganda. It discourages the use of language that emphasizes the investment nature of the planned gift products being sold and encourages semantic gamesmanship to conceal that investment nature. In 1994, the Council criticized the UJA for its advertising of planned gifts, and particularly for emphasizing tax benefits and investment over the notion of gifts in its advertisements regarding gift annuities. The Council stated in a letter to the UJA: "We have tried for many years to scrupulously avoid applying investment terminology to gift annuities. We refer to 'issuing' gift annuities rather than 'selling' gift annuities and we talk about 'annuity payments' rather than 'income' or 'interest' . . . ." The purpose of this has been to avoid drawing the attention of government regulators to the sponsors' investment products.

56. These facts demonstrate that the Council's primary purposes are not educational or charitable. Rather, the purposes of the Council are primarily to suppress competition and to provide a range of services exclusively to the sponsor organizations that make up the Council.

THE COUNCIL FRAUDULENTLY OBTAINED SECTION 501(c)(3) STATUS

57. In 1989, the Committee undertook a long range planning effort to study whether the Committee, an unincorporated association, should be transformed into some other kind of entity--namely a non-profit corporation qualifying for tax-exempt status under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3). The Committee's Long Range Planning Committee decided that the Committee would not be able to qualify as a section 501(c)(3) organization. The Long Range Planning Committee reported in 1989:

> It is unlikely the Committee could qualify for tax-exempt status under Section 501(c)(3) if it were structured as a non-profit corporation. As a general rule, an organization will not qualify under Section 501(c)(3) simply because it provides services exclusively to Section 501(c)(3) organizations. To obtain a Section 501(c)(3) exemption, an organization must have its own tax-exempt purposes.

58. Still, the members of the Committee recognized that the effectiveness and influence of their price-fixing conspiracy would be enhanced if the Council could induce the IRS to give it a determination letter. The Long Range Planning Committee reported that if it became a 501(c)(3) entity:

> The Committee could expand its services to the membership and respond to developing needs, both with respect to information and valuation cables and

> could provide an ongoing legislative presence representing the members of the Conference [on Gift Annuities] before the Congress or the IRS.

The Committee further recognized that it could raise more money through tax deductible contributions if it could obtain a 501(c)(3) letter.

59. Later in 1992, the same Long Range Planning Committee identified how the Committee would have to change in order to obtain bona fide 501(c)(3) status. It concluded that if "the purpose of the organization were primarily to provide education and information to member charities and others about gift annuities and other forms of planned gifts, then it is possible that the Committee could be recognized as a 501(c)(3), tax exempt educational organization. . . . If, on the other hand, the purpose is to provide other services to member organizations, then it probably would not be granted 501(c)(3) status." The Committee, however, never changed its purposes or operations. Instead, the decision was made to incorporate the Committee into the Council and to seek tax-exempt status as a section 501(c)(3) organization by emphasizing its purported "educational functions" and concealing its noneducational ones.

60. In 1993, the Council was incorporated as a Texas Non-Profit Corporation, and it applied for tax-exempt status under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3) of the Code. In the course of reviewing the Council's application, the IRS asked the Council a series of questions to which the Council responded in a letter dated October 1, 1993. The letter was replete with numerous material misrepresentations and omissions, calculated to deceive the IRS and keep from revealing the true nature and functions of the Council.

61. In its October 1, 1993 letter, the Council stated:

"The Committee has never been a separate organization." In fact, the 9th Conference on Gift Annuities in 1955 passed a resolution expressly making the Committee an independent organization. The Council further asserted that the Committee was operating under the "auspices" of the Annuity Board of the Southern Baptist Convention. In fact, however, the Annuity Board had merely been providing the Committee with office space. The purpose of these misrepresentations was to avoid inquiry about the extensive, past independent and nonexempt activities of the Committee and about the Committee's failure to pay taxes during its years as an unincorporated association.

62. The Council told the IRS that it intended to carry on the purposes and operations of the Committee. However, the Council focused exclusively on its purported "educational functions" in its response to IRS inquiries. It stated "the Council's educational and instructional training activities will consist primarily of the triennial Conference on Gift Annuities, which is devoted almost exclusively to the continuing education of planned giving professionals who are representatives of charitable organizations."

63. As set out above, the overall activities of the Council vastly exceed the conducting of a triennial Conference on Gift Annuities. In addition, the Council misrepresented the facts when it stated that the Conferences are attended by "representatives of charitable organizations." The Council failed to point out that some attendees are representatives of private sector commercial companies who are also sponsors of the Council. This information would have been a red flag, as the Council stated to the IRS that one of its purposes was to prevent competition with the private sector.

64. The Council was also misleading by describing the triennial Conferences as being "devoted almost

exclusively to the continuing education of planned giving professionals... " In fact, substantial effort is devoted at the triennial Conferences to obtain agreement to the Council's uniform maximum annuity rates.

65. The Council further misrepresented the facts when it said: "considerable advice is rendered to numerous charitable organizations regarding compliance with state regulations applicable to gift annuities." In fact, the Council gives considerable advice to charities on how to avoid complying with state regulations. For example, as set forth above, the Council has told sponsors not to contact state regulators directly with questions about gift annuities.

66. The Council described one of its "educational functions" as being "to promulgate recommended maximum annuity rates for single and two-life gift annuities." The Counsel told the IRS that "under the rates that will be recommended by the Council, charitable gift annuities produce a return much inferior to that offered by commercial insurers, so that no threat of competition with the private sector exists." The clear implication of this statement was that charitable gift annuities would not compete with commercial annuities. This statement was deceptive because it omitted at least the following material facts:

a. Charitable gift annuities are often marketed by comparing them to other commercial investments, principally bank certificates of deposit. Moreover, they are also marketed by comparing the rate of return and the tax advantage of a charitable gift annuity to the return of other commercial investments.

b. The Committee had originally been set up not to suppress competition between issuers of charitable gift annuities and private sector issuers of commercial annuities, but rather to suppress competition among issuers of gift annuities. It had

been recognized that charities could raid each other's constituents by offering higher rates of return on gift annuities. Indeed, despite an IRS request for such information, the Council appears not to have provided the IRS with a copy of its pamphlet, Why Your Organization Should Be A Sponsor Of The American Council On Gift Annuities. That publication describes the Council's anticompetitive purposes and its policing activities. This noneducational purpose was never disclosed to, and was concealed from, the IRS.

c. By 1993, when the letter was written, commercial rates had dropped to a point where they were in fact competing with gift annuity rates.

d. Sponsors of the Council include commercial insurance companies and banks interested in preventing gift annuities from competing with their products.

67. Finally, the Council misrepresented to the IRS that it would not be entering into any written contracts or leases until at least 1995. Within two months making that statement to the IRS, however, the Council executed a General Conveyance, Bill of Sale, Assignment and Assumption Agreement with the Committee. The purpose for this misrepresentation was to further conceal from the IRS the substantial independent and nonexempt nature of the Committee.

68. The Council also failed to disclose that it makes no effort to provide different points of view or different annuity rates. It therefore does not offer a sufficiently fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion, and therefore is not an educational organization.

69. In addition to these numerous misrepresentations, the Council completely failed to disclose to the IRS any of its lobbying, public relations, law avoidance, policing, coercing, and other activities or functions as set out above. In sum, the Council has many nonexempt purposes, including suppressing competition, improving the business and political climate for its sponsors, avoiding government regulation, lobbying, and performing services for other organizations. The Council's internal documents confirm that the Council knew that these purposes made it ineligible for 501(c)(3) status, so these matters were concealed and misrepresented to the IRS in order to increase the effectiveness and influence of the price-fixing conspiracy.

70. After receiving this false and deceptive information, the IRS issued a letter on October 22, 1993 granting the sought for tax-exempt status. The letter from the I.R.S. stated, "Based on information you supplied, and assuming your operations will be as stated in your application for recognition of exemption, we have determined you are exempt from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3)." (Emphasis added.) By receiving recognition as a section 501(c)(3) organization, the Council could more easily accept donations for which donors may receive federal income tax deductions. Under cover of this letter, the Council may sell annuities eligible for such deductions without its activities being investigated if an annuitant claimed a deduction.

71. Numerous Defendants, as members of the Committee, including representatives of the Baptist Foundation of Texas, assisted in preparing the Council's application for 501(c)(3) recognition. Each participated in preparing responses to IRS inquiries. Each knew of the false statements being made to the IRS as well as the material facts concealed and omitted from the responses to the IRS' questions. Each participated in making

misrepresentations and omissions so as to obtain section 501(c)(3) recognition from the IRS. Plaintiff alleges that discovery will show that the CGA Defendants knew or should have known of the Council's lack of eligibility for 501(c)(3) status.

Other Sponsors Are Not Legitimately Be Section 501(c)(3) Organizations

72. The Lutheran Foundation of Texas, the Baptist Foundation of Texas, and other Council sponsors are not valid Texas Non-profit corporations under Texas Revised Civil Statutes Article 1396-2.01. Prior to recent changes in Texas state law, these organizations engaged in activities which constituted the business of banking and of insurance by acting as trustee to charitable trusts and by selling annuities.

73. The activities of Council sponsors such as the Baptist Foundation of Texas and the Lutheran Foundation of Texas include serving as trustees, especially of revocable management trusts, and in providing financial management for the noncharitable funds of independent third parties through the administration of various types of trusts. These activities are not related to any exempt purpose and inure to the benefit of independent third parties. Upon information and belief, Plaintiff alleges that discovery will reveal that such activities constitute a substantial purpose and function of many CGA Defendants thereby disqualifying them as bona fide 501(c)(3) entities.

The Price-Fixing Conspiracy

74. Nonprofit organizations market their financial products in competition with each other. Plaintiff alleges that the Council, the CGA Defendants, and the Commercial Defendants have entered into contracts, combinations, and conspiracies with each other to fix the rates of return on charitable gift annuities.

75. At all times relevant to this Complaint, the Council and the CGA Defendants have competed with each other in interstate commerce for the sale of charitable gift annuities. Evidence of this competition includes the fact that 65 % of respondents to the 1994 Survey said prospective purchasers of annuities compared the Council's rates to those of other organizations. Although the sale of charitable gift annuities is interstate trade and commerce, it is not the "business of insurance" for purposes of federal antitrust laws. Rather than be willing to let the forces of fair competition permit the allocation of societal resources to the spectrum of charitable organizations, these organizations ha[illegible]ntentionally banded together to insulate themselves from the forces of competition.

76. They have formed organizations for the express purpose of developing maximum gift annuity rates and methods of yield computations; establishing uniform gift annuity rates; publishing and circulating such rates among themselves; and encouraging other charitable organizations to also follow the uniform, maximum rates and refuse to offer annuitants rates of return higher than those maximum rates. These organizations have actively and successfully aided the Council and the CGA Defendants in carrying out this purpose and intent and have acted as their agent in doing so.

77. The organization currently serving as the agent and spearhead for this illegal price fixing is the Council, a Texas non-profit corporation. The Council is authorized by more than 1,400 charitable organizations and institutions (as well as some individuals) to represent them on matters concerning gift annuity agreements, pooled income funds, and other types of life income products. These sponsors actively support the Council and have agreed to sponsor the Council's activities. The Council's preferred motto is "cooperate, don't deviate." There is substantial evidence that the members and sponsors of the Council have agreed to follow the Council's annuity rates of return. The Council

acknowledges "widespread" compliance with its rates and calls deviations "unusual." In fact, sponsors of the Council actively seek to ensure that fellow sponsors follow the rates by reporting those who deviate to the Council. The Council's literature provides that it monitors and takes action concerning annuity rates.

78. The Council is headquartered in Dallas, Texas (as was one of its predecessors, the Committee on Gift Annuities). Sponsors from all over the country request and receive the illegal uniform rates from the Council's headquarters in Dallas, pay membership fees to the Council in Dallas, and otherwise correspond and communicate with the Council in Dallas. The Council holds a triennial conference on planned giving. In fact, the Council held the 1992 conference in Dallas -- attended by most of the sponsors. At each conference, the fixed rates of return are adopted by the sponsors of the Council. During the interim between conferences, the members of the Council act on behalf of the sponsors to analyze and determine the next schedule of uniform rates and monitor compliance with those rates. Additionally, documents produced by the Council reveal that the Baptist Foundation of Texas is not only a member of the Council, but is the leader of this core group of price-fixers.

79. According to the application form for Council sponsorship, sponsors "band together" to "monitor the issuance of gift annuity agreements." Indeed, the Council regularly corresponds with its sponsors about rates, and in at least 1991 and 1994 surveyed its membership about its rates. In 1993, the Committee chair had notified sponsors that the Committee's rates were "maximum rates and that lower rates are not prohibited or discouraged by the Committee." In 1994, after extensive consultation with its sponsors, the Council lowered the maximum gift annuity rates. Upon lowering the rates, the Council chairman advised Council members that the Council's rates were

recommended maximum rates, and that "as always, they remain free to use lower rates if they chose."

80. After this 1994 rate cut, the Council surveyed its members and reported that 75 % of the members "agreed" to the Council's action in lowering the uniform rates. The 1994 Survey revealed that 69.7 % of the responding organizations "always followed the Council rates" and over 97% of the Council members usually follow the Council rates. Thus, a very small percentage of the Council sponsors responding to the survey deviate from the rates and, when they do, they usually pay lower rates, rather that higher ones. In sum, the survey respondents (about 60% of the sponsors) were reported to have issued nearly $1.2 billion in annuities (over $300 million in 1993 alone) to annuitants, mostly women, with an average age of 77. The total number of annuity contracts in force with the respondents was 80,688.

81. The express purpose and intent of these maximum rates is to suppress price competition that would otherwise exist. According to the Council's Spokesman, the rates "are intended to assure a 'level playing field' for charities, in that the annuity rate offered to a donor of a given age will be uniformly the same for all charities, so that a donor's choice of the charitable beneficiary of a gift annuity will depend upon the relative merits of the institutions under consideration in the subjective judgment of the donor." In other words, the rates are designed to ensure no price competition. Two or more charities competing for the sale of an annuity to a given consumer need not worry about losing the sale to another charity that might pay a higher rate of return, because such other charity has agreed that its rates "will be uniformly the same for all charities." Moreover, if the income paid to the annuitant is kept lower, then the charity receives a larger profit when the annuitant dies. According to the Council's Spokesman, by artificially keeping rates lower, the charities are protected from the "threat of competition" from the private sector.

82. The Council's rates are also designed to ensure that its members and sponsors receive a significant benefit from the transaction as deemed appropriate by the Council and to minimize, to the degree deemed appropriate by the Council, the possibility that the charity will be required to use its assets to make annuity payments. According to a leading commentator on charitable gift annuities, the sponsors of the Council are encouraged to follow the Council's published and circulated rates in order to discourage competition among charities and to ensure that at least 50% of the money or property used to fund the annuity is left at the death of the annuitant. Indeed, Council promotional materials contain the following warning: "It is important not to exceed Conference rates because the rates are calculated to assure that there will be a substantial gift to benefit the charity." A true and correct copy of the Council materials, including the Uniform Gift Annuity Rates, is attached hereto as Exhibit B. In fact, according to the 1994 Survey, by complying with the Council's rates, sponsors have been able to receive "nearly all of the original" annuity contributions upon the death of their annuitants.

83. Council sponsors meet and correspond on a regular basis concerning rates of return and methods of calculating such rates, and charities are reminded that the Council "takes action concerning the rates." Upon information and belief, Plaintiff alleges that representatives of members of the Council have used threats, intimidation, and coercion to carry out their concerted objectives. Council sponsors are encouraged to "network" with each other and are schooled in techniques for avoiding detection of their activities by government regulators.

84. The Council, the CGA Defendants, and the Commercial Defendants fraudulently concealed their illegal activities. As religious or charitable organizations to whom the members of the Plaintiff Antitrust Class entrusted their financial future through the purchase of annuities, the

Charitable Defendants, as a matter of law, owed the Plaintiff Antitrust Class a duty to disclose the facts concerning the setting of the annuity rates. These organizations breached their duty to disclose by failing to disclose the material facts concerning the illegal setting of rates and terms for the annuities set by the Council, the CGA Defendants, and the Commercial Defendants in concert with one another. In addition, these organizations actively concealed the material facts concerning the illegal fixing of the rates and terms of the annuities from the Plaintiff Antitrust Class. The organizations conducted secret communications and meetings that were closed to the Plaintiff Antitrust Class during which the rates and terms of the annuities were illegally fixed. The organizations further concealed the facts concerning the antitrust violations by their active efforts to conceal illegal activities from various state regulators, including communicating with regulators through third parties and other attempts to avoid detection.

85. Because of the fraudulent concealment by the Council, the CGA Defendants, and the Commercial Defendants, members of the Plaintiff Antitrust Class, including Plaintiff, failed to discover the facts constituting the violation within the applicable limitations period despite the exercise of due diligence. Specifically, because of the religious or charitable nature of these organizations, the Plaintiff Antitrust Class had no reason to suspect that the rates and terms of the annuities were being illegally fixed by the Council, the CGA Defendants, and the Commercial Defendants. Indeed, the Council and the CGA Defendants actively encouraged the Plaintiff Antitrust Class to rely upon them. Such acts discouraged any further investigations by the Plaintiff Antitrust Trust Class.

86. The rates of return paid by the CGA Defendants on charitable gift annuities during the class period reflect the use by the CGA Defendants of uniform rates and methods of calculating such rates. By virtue of obtaining

and utilizing gift annuity rates and yield computations for pooled income fund agreements from the Defendant Council, the CGA Defendants paid less than competitive rates of return on such annuities. Absent such price fixing, rates of return on charitable gift annuities would have risen to competitive levels for charitable gift annuities. The fixing of rates of return has had the effect of suppressing competition among charitable organizations for the sale of annuities.

The Commercial Defendants Participate in the Price-Fixing Conspiracy

87. The Commercial Defendants pay membership dues to the Council, which financially helps support the Council's efforts to set and enforce uniform maximum rates of return on gift annuities. Moreover, the Commercial Defendants attend the triennial Conference on Gift Annuities, where uniform rates are approved. The Commercial Defendants have an incentive to keep gift annuity rates low so that they do not pose a competitive threat to the investment products sold by the Commercial Defendants. Under federal law, nonprofit organizations can offer a rate of return that is as much as 90% of the return offered by commercial annuities without the annuity revenue being classified as acquisition indebtedness for purposes of unrelated business income. In 1993, falling interest rates created a situation where gift annuity rates were actually competitive with commercial annuity rates. Thus, in 1994, the Council adopted new reduced rates for gift annuities and other life income products sold by charities. Upon information and belief, Plaintiff alleges that the Commercial Defendants have knowingly joined and supported the alleged conspiracy to prevent competition with their products.

* * *

CLAIMS FOR RELIEF

Count One
Claim for Violation of Section One of the Sherman Antitrust Act
On Behalf of the Plaintiff Antitrust Class

199. All foregoing paragraphs are incorporated herein by reference.

200. By the conduct described above, the Council, CGA Defendants, and Commercial Defendants have entered into contracts, combinations, and conspiracies to fix the rates of return on charitable gift annuities and methods for calculating such returns. The Council, CGA Defendants, and Commercial Defendants have organized and operated pursuant to unlawful agreements to abide by and utilize maximum gift annuity rates and methods for calculating such rates.

201. The purpose, intent, and effect of such agreements is to fix rates of return on charitable gift annuities and suppress interstate competition among charities for charitable donations and to suppress interstate competition among sellers of annuity investments.

202. This unlawful conduct has injured the Plaintiff and the members of the Plaintiff Antitrust Class in their business or property.

203. The activities alleged herein are not exempt from the antitrust laws pursuant to the Charitable Gift Annuity Antitrust Relief Act, as they involve agreements among entities not described in section 501(c)(3) of the Internal Revenue Code and not exempt from taxation under section 501(c)(3) of such Code and involve activities in addition to the use and agreement to use the same annuity rate with respect to charitable gift annuities.

204. The conduct of the Council, CGA Defendants, and Commercial Defendants constitutes a *per se* violation of section one of the Sherman Act, 15 U.S.C. § 1. In the alternative, their conduct constitutes an unreasonable restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. 1.

* * *

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, on behalf of herself and the plaintiff classes, prays for judgment against the defendants named in each count alleged herein as follows:

Count One

Judgment on behalf of the Plaintiff and the Plaintiff Antitrust Class as follows:

1. A declaration that the conduct of the Council, CGA Defendants, and Commercial Defendants is unlawful price fixing under Section 1 of the Sherman Act, 15 U.S.C. § 1;

2. A permanent injunction enjoining the Council, CGA Defendants, and Commercial Defendants and their agents and employees from conspiring and agreeing to fix the rates of return and methods of calculating rates of return on charitable gift annuities; and

3. Three times actual damages against the Council, each Charity Defendant, and each Commercial Defendant, jointly and severally, in an amount to be determined at trial.

* * *

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF AND THE PLAINTIFF CLASSES REPRESENTED

EXCERPTS OF PETITIONERS' REPLY BRIEF IN THE COURT OF APPEALS

No. 96-11332

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOYD L. RICHIE, as Guardian of the Estate of LOUISE T. PETER, on behalf of LOUISE T. PETER individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

vs.

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., Individually and as Successor to the COMMITTEE ON GIFT ANNUITIES, an Unincorporated Association, THE LUTHERAN CHURCH-MISSOURI SYNOD, THE TEXAS DISTRICT OF THE LUTHERAN CHURCH-MISSOURI SYNOD, THE LUTHERAN FOUNDATION OF TEXAS, BAPTIST FOUNDATION OF TEXAS, GRAY, PLANT, MOOTY, MOOTY & BENNETT, SOUTHERN BAPTIST CONVENTION, GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, D/B/A GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, ANDERSON UNIVERSITY, INC. D/B/A ANDERSON UNIVERSITY, MOUNT HOLYOKE COLLEGE, GOOD SHEPHERD HOME FOUNDATION, NORTHWESTERN UNIVERSITY, AMERICAN BAPTIST FOUNDATION, LOMA LINDA UNIVERSITY, SMITH COLLEGE, UNIVERSITY OF COLORADO FOUNDATION, INC., THE SALVATION ARMY, A NEW YORK CORPORATION, THE SALVATION ARMY, A GEORGIA CORPORATION, THE SALVATION ARMY, A CALIFORNIA CORPORATION, THE SALVATION ARMY, AN ILLINOIS CORPORATION, UNITED CHURCH OF CHRIST, PLANNED GIVING SERVICES, INC., D/B/A PLANNED GIVING SERVICES, HAY/HUGGINS COMPANY, INC., PRERAU & TEITELL, VASSAR COLLEGE, AMERICAN BAPTIST FOREIGN MISSION SOCIETY, ST. OLAF COLLEGE, WITTENBERG UNIVERSITY, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE MOODY BIBLE INSTITUTE

OF CHICAGO D/B/A MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, AND AMERICAN LEPROSY MISSIONS, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Wichita Falls Division

REPLY BRIEF OF APPELLANTS THE MOODY BIBLE INSTITUTE OF CHICAGO D/B/A MOODY BIBLE INSTITUTE, THE AMERICAN BIBLE SOCIETY, AND AMERICAN LEPROSY MISSIONS, INC.

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December 17, 1996

* * *

ARGUMENT

Appellants The Moody Bible Institute of Chicago d/b/a Moody Bible Institute, The American Bible Society, and American Leprosy Missions, Inc., (the "Moody Appellants") adopt the arguments set forth in the Reply Brief of Appellants and submit this separate reply brief to address Plaintiff's contention at pages 32-35 of his Brief that the District Court correctly concluded at page 8 of the September 30 Order that, "if the [American] Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception." For the reasons set forth below, that contention is wrong as a matter of law and the Moody Appellants are entitled to dismissal of Plaintiff's price-fixing claim pursuant to the Antitrust Relief Act, 15 U.S.C. § 37.

I. PLAINTIFF'S CONTENTION THAT EACH ISSUER'S IMMUNITY TURNS ON THE 501(c)(3) STATUS OF THE AMERICAN COUNCIL IGNORES THE LEGAL AND HISTORICAL BACKGROUND OF THE ANTITRUST RELIEF ACT.

As demonstrated in the Brief of Appellants, the District Court denied Defendants' Motion to Dismiss Plaintiff's price-fixing claim even though the District Court expressly acknowledged that Congress, in enacting the Antitrust Relief Act, sought as its overriding purpose to immunize from antitrust scrutiny the rate-setting scheme alleged in this action. Ironically, the District Court, in denying Defendants' motion, claimed to be adhering to the will of Congress rather than frustrating it. Thus, the District Court claimed to be following "the text's plain language" when it ruled that each Defendant's entitlement to the immunity granted by the Antitrust Relief Act turns on a factual determination regarding the bona fides of the American Council's 501(c)(3) status:

> [I]f the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception. *Hartford Fire Ins. Co. v. California*, 113 S.Ct. 2891, 2902-03 (1993). The new exemption in this case has both status-based ("persons described in section 501(c)(3) and exempt from taxation under section 501(a)") and conduct-based ("use or agreeing to use the same annuity rate" for purposes of issuing charitable gift annuities) elements similar to the Capper-Volstead exemption, 7 U.S.C. § 291. Even if the Rule of Forfeiture did not apply (which it does), the new exemption certainly does not exempt or otherwise authorize conspiracies with nonexempt entities.

Id. at 8. At pages 32-35 of his Brief, Plaintiff argues for affirmance of this conclusion.

In truth, "the text's plain language" requires no such result. Rather, when read in light of generally applicable principles of antitrust law and the specific antitrust allegations that motivated its enactment, the plain language of the Antitrust Relief Act clearly immunizes from antitrust scrutiny the purported rate-setting agreement challenged in this action, regardless of the 501(c)(3) status of the American Council or the 501(c)(3) status of any other entity that, like the American Council, is not alleged to have issued any charitable gift annuities.[1]

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[1]While the Moody Appellants agree that the best indication of congressional intent generally is the language Congress actually enacted into law, *see Hammers v. IRS*, 988 F.2d 32, 34 (5th Cir. 1993) (holding that "[t]he most certain expression of legislative intent in nearly every instance is the words of the subject statute"), they disagree with the District Court's conclusion that following the will of Congress as expressed in the plain language of the Antitrust Relief Act requires a result that is at odds with the conceded purpose of the statute: to

A. A Price-Fixing Conspiracy Requires the Participation of Horizontal Competitors.

To be unlawful under Section 1 of the Sherman Act, an alleged price-fixing agreement must be an agreement between or among competitors. "[A]n agreement not to compete between two parties who are not actual or potential competitors is not per se or otherwise illegal." *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990), *cert. denied sub nom., Rutland v. United States*, 499 U.S. 936, 111 S. Ct. 1388 (1991); *see also Transource Int'l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 280 (5th Cir. 1984) (holding that agreement between a rail car manufacturer and a rail car marketer did not constitute a violation of Section 1 because the parties were neither actual nor potential competitors).

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immunize from antitrust scrutiny the alleged rate-setting agreement challenged by this lawsuit. Thus, the Moody Appellants believe that the District Court, while claiming to follow abundant precedent directing courts to eschew reliance on legislative history where the plain language of a statute is unambiguous, actually violated the first principle of statutory construction requiring courts to construe legislation in conformity with its purpose. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 113 S. Ct. 2173, 2182 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (citation omitted); *Negonsott v. Samuels*, 507 U.S. 99, 113 S. Ct. 1119, 1122 (1993) ("'Our task is to give effect to the will of Congress . . . .'") (citation omitted); *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001 (1990) (relying on statute's language, "the design of the statute as a whole," the statute's "object and policy," and its history to determine the meaning of a statute); *Hammers*, 988 F.2d at 34 ("The sole purpose of statutory construction . . . is to ascertain the intent of the legislative authority"). As a result, the District Court applied the Antitrust Relief Act in a manner that not only undermines what the District Court conceded was the specific intention of Congress in passing this legislation -- to immunize from antitrust scrutiny the rate-setting scheme underlying this action -- but also ignores both the principles of antitrust law that define an actionable price-fixing agreement and the nature of the alleged rate-setting conspiracy Congress sought to immunize by its enactment.

An agreement between two entities that do not compete with one another on the same level of distribution, even an agreement setting the prices at which each will sell its respective wares, is not actionable under the Sherman Act as a price-fixing agreement. *See Royal Drug Co., Inc. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436 (5th Cir. 1984) (holding that agreements between an insurance company and various retail pharmacies fell "outside those categories of activity classified as *per se* illegal price fixing . . . because the agreements [did] not run between competitors"), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 912 (1985).

Although an actionable price-fixing conspiracy may include conspirators who do not compete with other members of the conspiracy, *see MMR Corp.*, 907 F.2d at 498 ("If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors"), an actionable price-fixing conspiracy must include at least two entities that compete horizontally on the same level of distribution, *see, e.g., United States v. All Star Indus.*, 962 F.2d 465, 469 (5th Cir.) ("'[A]greements among ***competitors*** to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.'") (emphasis added; citation omitted), *cert. denied sub nom., Midco Pipe & Tube, Inc. v. United States*, 506 U.S. 940, 113 S. Ct. 377 (1992); *Royal Drug Co.*, 737 F.2d at 1436. Thus, the defining quality -- the *sine qua non* -- of an unlawful price-fixing agreement is the participation of at least two entities that compete with one another in the same market. *See Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 470 (5th Cir. 1992); *All Star Indus.*, 962 F.2d at 469; *MMR Corp.*, 907 F.2d at 498; *Royal Drug Co.*, 737 F.2d at 1436; *Transource Int'l Inc.*, 725 F.2d at 280. Where such participation exists, liability attaches under Section 1; where such participation is absent, no unlawful price-fixing agreement exists. Although participation in such a conspiracy by persons who do not compete with other members of the conspiracy, whether

such non-competitors participate as facilitators of the conspiracy or otherwise, does not negate the existence of an actionable price-fixing agreement, such participation is neither a necessary nor a sufficient condition to antitrust liability. For purposes of antitrust analysis, the participation of such non-competitors is irrelevant.

B. The Structure of the Antitrust Relief Act Reflects the Requirement of Horizontal Competition.

From the foregoing discussion of price-fixing agreements, it is easy to see how Congress could draft an antitrust exemption that would exempt the widget market from price competition and immunize all widget sellers from liability for price fixing. Because an agreement setting prices for widgets is actionable only if two or more widget sellers are parties to the agreement, Congress could grant an immunity for widget sellers by enacting legislation structured very similarly to the Antitrust Relief Act and providing: "It shall not be unlawful under the federal antitrust laws for 2 or more widget sellers to use, or to agree to use, the same price for the purpose of selling 1 or more widgets." Such legislation would exempt a wide range of otherwise actionable combinations, including: an agreement between any two widget sellers; an agreement among any two widget sellers and an advertising firm; an agreement among any four hundred widget sellers, a trade association of widget sellers, and an advertising firm; and any other combination alleged to be unlawful on the ground that it involved a horizontal agreement to fix the price of widgets. It would exempt all such combinations, because each would be unlawful in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more widget sellers competing horizontally for sales of widgets. By exempting from antitrust scrutiny the common feature that made each such combination unlawful in the absence of the statutory immunity -- an agreement between or among two or more competitors for widget sales --

Congress would have immunized all such combinations alleged to be unlawful on the ground that they involved horizontal agreements to fix the price of widgets.

Similarly, if the issuance of charitable gift annuities were misconstrued to be trade or commerce within the meaning of the Sherman Act, as it was by the District Court's Order dated March 14, 1995,[2] and Congress wished to exempt the issuance of charitable gift annuities from price competition and to immunize all issuers of charitable gift annuities from antitrust scrutiny for alleged price fixing, Congress could do so by enacting a similarly structured statute providing: "It shall not be unlawful under the federal antitrust laws for 2 or more issuers of charitable gift annuities to use, or to agree to use, the same annuity rate for the purpose of issuing one or more charitable gift annuities." Such a statutory exemption would immunize from antitrust scrutiny: an agreement between any two issuers of charitable gift annuities; an agreement among any two issuers of charitable gift annuities and an actuarial firm; an agreement among any four hundred issuers of charitable gift annuities, an association of such issuers, and an actuarial firm; and any other combination alleged to be unlawful on the ground that it involved a horizontal agreement to fix the rates of return for charitable gift annuities. It would immunize all such combinations, because each would be unlawful in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more issuers of charitable gift annuities competing horizontally to issue one or more charitable gift annuities.

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[2]As demonstrated in the Brief of Appellants at 31-33, the issuance of charitable gift annuities does not constitute trade or commerce subject to antitrust scrutiny. *See D.E.L.T.A. v. Humane Soc'y of the United States, Inc.*, 50 F.3d 710, 712-14 (9th Cir. 1995). For the purpose of the arguments made in this Reply Brief only, however, the Moody Appellants assume *arguendo* that the issuance of charitable gift annuities constitutes trade or commerce subject to the Sherman Act.

C. The Text of the Antitrust Relief Act Reflects Plaintiff's Allegations in this Action.

If, as Plaintiff suggests at pages 33-34 & n.10 of his Brief, Congress were unwilling to confer antitrust immunity on ***all*** potential issuers of charitable gift annuities but, instead, wished to immunize only the issuers whose alleged anticompetitive behavior was being subjected to scrutiny in this lawsuit, then a statute providing that "[i]t shall not be unlawful under the federal antitrust laws for 2 or more issuers of charitable gift annuities to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities" would be too broad to achieve Congress' specific intent. Importantly, however, the overbreadth of such a statute would not lie in its immunization of rate-setting agreements involving entities such as the American Council that do not issue charitable gift annuities. As noted *supra* at 3-4, the participation of such non-issuers is irrelevant to the underlying antitrust analysis, because those non-issuers, by definition, do not compete with issuers. Moreover, the legislative history of the Antitrust Relief Act demonstrates that Congress was not concerned with the participation of the American Council or any other non-issuing entities, such as attorneys, accountants, actuaries, or consultants. *See* H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995) (stating that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants, and others . . . when assisting [501(c)(3) organizations] in the issuance of a charitable gift annuity or the setting of charitable annuity rates").[3] Rather, as Plaintiff acknowledges at pages 33-34 &

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[3]In fact, the House Report states plainly that Congress intended the exemption "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995).

n.10 of his Brief, the hypothetical statute discussed above would be too broad because it would immunize an agreement between ***any*** two issuers of charitable gift annuities, even if the conduct of neither were a subject of this action. Thus, for example, such a statute would immunize an agreement between two entities described in 26 U.S.C. §§ 170(c)(3) and 501(c)(20), such as the VFW and the American Legion, neither of whom is alleged to be a party to the conspiracy challenged in this action. To achieve its specific purpose to immunize the rate-setting scheme alleged in this case, therefore, Congress had to include in the statute verbiage specifying the particular subset of issuers that it intended to immunize from antitrust scrutiny.

Coming up with a description of the specific issuers Congress intended to protect was not difficult, for, as Congress was aware from its review of this case, each of the "competitors" for "sales" of charitable gift annuities alleged to be a conspirator in this action is (or at the very least claims to be) an organization described in 26 U.S.C. § 501(c)(3) that is exempt from taxation under 26 U.S.C. § 501(a). Armed with this common attribute of the subset of issuers it sought to immunize, Congress crafted a statute structured to reflect the generally applicable principles of price-fixing law discussed above and worded to specify the subset of issuers Congress sought to immunize from this unprecedented lawsuit and any other suits of its ilk. The result is a purposefully tailored statute providing that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." 15 U.S.C.S. § 37 (Lawyers Coop. 1996 Supp.).

D. The Structure and Text of the Antitrust Relief Act Support Defendants.

From the foregoing discussion, it is apparent that the structure and text of the Antitrust Relief Act are carefully crafted to immunize from antitrust scrutiny ***any*** combination alleged to be unlawful on the ground that it constitutes an agreement between or among 501(c)(3) issuers of charitable gift annuities to fix the annuity rate for charitable gift annuities issued by any parties to such agreement that are 501(c)(3) organizations competing to issue charitable gift annuities. Contrary to Plaintiff's assertions, the structure and language of the Antitrust Relief Act -- when considered in their legal and historical context -- plainly immunize from antitrust scrutiny: an agreement between any two or more 501(c)(3) organizations fixing the annuity rate on charitable gift annuities issued by some or all of them; an agreement among any two or more 501(c)(3) organizations and any one or more non-issuer(s) of charitable gift annuities -- regardless of the tax-exempt status(es) of such non-issuer(s) -- fixing the annuity rate on charitable gift annuities issued by some or all of the 501(c)(3) organizations; and any other combination alleged to be an unlawful agreement to fix the annuity rate for charitable gift annuities issued by any one or more 501(c)(3) organization(s). The Antitrust Relief Act immunizes all such combinations, because, as noted above, each would subject its members to liability in this lawsuit in the absence of the statutory immunity only insofar as it involved an agreement between or among two or more of the entities alleged in this action to be competitors for the issuance of charitable gift annuities -- that is, "two or more persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code . . . ."

As noted above, the participation of persons not alleged to be competitors in the issuance of charitable gift annuities simply has no antitrust significance; such participation is

neither a necessary nor a sufficient condition to liability for price fixing. Thus, when viewed from an antitrust perspective, the 501(c)(3) status of non-issuers such as the American Council is irrelevant to the purpose Congress intended to achieve through enactment of the Antitrust Relief Act. Even if the Court were to assume, as Plaintiff asserts, that the American Council is not a bona fide 501(c)(3) organization, therefore, the District Court's conclusion that the Moody Appellants' immunity under the Antitrust Relief Act turns on the 501(c)(3) status of a non-issuer such as the American Council is not only contrary to the will of Congress as expressed in the legislative history of the Antitrust Relief Act but also contrary to the plain language Congress enacted into law.

II. APPELLEE'S CONTENTION THAT EACH ISSUER'S IMMUNITY TURNS ON THE ACCURACY OF EACH AND EVERY OTHER ISSUER'S APPLICATION FOR TAX-EXEMPT STATUS IGNORES COMMON SENSE AND THE MANIFEST PURPOSE OF THE ANTITRUST RELIEF ACT.

Plaintiff also has attempted to avoid dismissal pursuant to the Antitrust Relief Act by recklessly alleging that two of the issuer Defendants (i.e., the Baptist Foundation of Texas and the Lutheran Foundation of Texas) also are not "bona fide 501(c)(3) entities." *See* Fourth Amended Class Action Complaint ¶ 73; *see also* Brief of Appellee at 31 (asserting that Plaintiff has alleged "agreements with certain entities holding 501(c)(3) letters but actual [sic] formed and operated for the substantial purpose of managing private investments"). According to Plaintiff, his allegation that certain issuers who agreed to use Council rates for issuing charitable gift annuities are not bona fide 501(c)(3) organizations that are exempt from taxation under section 501(a) of the Code bars dismissal of his claims against the Moody Appellants, notwithstanding Plaintiff's failure to allege any basis for concluding (a) that any of the

Moody Appellants is not a bona fide 501(c)(3) organization that is exempt from taxation under section 501(a) of the Code or (b) that any of the Moody Appellants knew or should have known of any other issuer's alleged lack of such bona fide status. *See* Fourth Amended Class Action Complaint.[4]

Plaintiff's argument should be rejected for at least two reasons. First, its application would lead to bizarre results

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[4]Where, as here, a plaintiff seeks to establish a Sherman Act violation by members of a group of persons to whom Congress has granted an express statutory exemption from the antitrust laws, the plaintiff must plead and prove specific facts that would place the defendants' conduct outside the scope of the exemption granted by Congress. *See USS-POSCO Indus. v. Contra Costa County Bldg. and Constr. Trades Council*, AFL-CIO 31 F.3d 800, 805 n.2 (9th Cir. 1994) (holding that plaintiff seeking to hold labor union liable under the Sherman Act had the burden of pleading and proving that union's purported anticompetitive conduct fell outside the statutory labor exemption found in 15 U.S.C. § 17); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 (7th Cir.) (affirming dismissal of antitrust claims against union, because plaintiff failed to allege that union had conspired with a non-labor entity and thus engaged in the conduct beyond the scope of the statutory labor exemption), *cert. denied*, 459 U.S. 860 (1982); *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711, 715 (N.D. Cal. 1981) (granting judgment on the pleadings to defendants on claim under Section 2 of Sherman Act, because plaintiff had failed to allege "predatory behavior by defendant[]" agricultural products cooperative that would place conduct of such cooperative beyond scope of antitrust exemption granted by Capper-Volstead Act, 7 U.S.C. §§ 291, 292); *see also id.* at 716 ("plaintiffs charging an agricultural cooperative with monopolization must establish specific acts, predatory in nature, which fall outside the purview of legitimate Capper-Volstead purposes"); *Frankford Hosp. v. Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104, 1112 (E.D. Pa. 1976) (observing that "the Sherman Act is irrelevant [to defendant insurer's liability] until plaintiff can carry its burden of showing that the McCarran-Ferguson Act does not apply"), *aff'd*, 554 F.2d 1253 (3d Cir. 1977). Thus, contrary to Plaintiff's unsupported assertion at page 20 n.4 of his Brief that Defendants have the burden of showing that they qualify for the immunity granted by the Antitrust Relief Act, Plaintiff bears the burden of pleading and proving that the Moody Appellants' conduct falls outside the scope of the antitrust immunity granted by Congress.

that Congress clearly could not have intended. Second, its adoption would unfairly deny Defendants the very same right that Plaintiff claims for himself and the putative plaintiff class to rely on IRS determination letters issued to issuers of charitable gift annuities.

A. Plaintiff's Interpretation of the Act Would Produce Bizarre Results.

The bizarre consequences that would attend acceptance of Plaintiff's argument are well illustrated by the hypothetical example of a rate-setting agreement formed in 1996 between two issuers of charitable gift annuities: one proven in court in 1999 to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) and another proven in court in 1999 to fail the criteria set forth in Section 501(c)(3) and to have fraudulently obtained its IRS determination letter in 1990. Under Plaintiff's logic, the issuer proven in court to be a 501(c)(3) entity could be held liable for treble damages, plus costs and attorneys' fees, regarding charitable gift annuities issued pursuant to the agreement by either issuer in 1996, 1997, 1998, and 1999, even if it had conscientiously examined the other issuer's IRS determination letter and Publication 78's listing of tax-exempt entities before entering in 1996 what it justifiably believed to be a lawful rate-setting agreement. Indeed, because there is no right of contribution in antitrust cases, *see Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-46 (1981), the issuer proven in court to be a 501(c)(3) entity could be forced to pay the entire judgment, while the issuer who obtained its determination letter fraudulently could avoid paying a dime. Although Plaintiff is correct in asserting that the legislative history of the Antitrust Relief Act suggests that Congress did not intend to afford immunity to issuers guilty of defrauding the IRS, *see* Brief of Appellee at 25 & n.5, nothing in the legislative history or in the text of the Antitrust Relief Act suggests that Congress intended to expose honest 501(c)(3) organizations to antitrust scrutiny

where, through no fault of their own, one of the entities with whom they acted in concert to establish rates of return for charitable gift annuities was later revealed to have obtained its 501(c)(3) determination letter by fraud or mistake. Because it would produce such "bizarre" results, Plaintiff's interpretation of the Antitrust Relief Act clearly should be rejected. *See Demarest v. Manspeaker*, 498 U.S. 184, 190-91, 111 S. Ct. 599, 604 (1992) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 575, 102 S. Ct. 3245, 3250, 3252 (1982), for the proposition that an interpretation of an apparently unambiguous statute is sufficiently "'at odds with the intentions of its drafters'" to be rejected where it would cause a result "so bizarre that Congress 'could not have intended' it").

B. Plaintiff's Interpretation of the Act Would Unfairly Deny Defendants a Right Plaintiff Claims for Himself.

Adopting Plaintiff's logic also would unfairly deny to honest issuers of charitable gift annuities the very same right that Plaintiff claims for himself and the putative Plaintiff class to rely on IRS determination letters.

At pages 16-17 of his Brief, Plaintiff argues that he is not estopped by Ms. Peter's tax deductions from challenging the 501(c)(3) status of charities who allegedly conspired to set the rates of return on the charitable gift annuities issued to Ms. Peter. In essence, Plaintiff asserts that he is free to challenge the tax-exempt status of the Defendants without endangering his ward's tax deductions because the tax deductions are available to donors regardless of the recipient's actual tax status. *See* Brief of Appellee at 19. At the same time, however, he argues that the Moody Appellants are not entitled to rely on IRS determination letters. *Id.* at 16-23.

Plaintiff's argument makes no sense. In truth, the Moody Appellants are far more entitled to rely on other issuers' IRS determination letters than is the Plaintiff.

The regulation on which Plaintiff relies applies when, through no action by the taxpayer, the IRS withdraws its prior determination that an entity to whom the taxpayer made donations in good faith is exempt from taxation under section 501(a). *See* Brief of Appellee at 19-20. In such a circumstance, allowing the taxpayer a right to such reliance makes sense, because the taxpayer has done nothing inconsistent with the existence of the organization's 501(c)(3) status, and the loss of such status is attributable solely to the actions of a third party (the IRS) over whom the taxpayer has no control.

Here, Plaintiff's claim that he is entitled to rely on the IRS' prior determination of the Defendants' respective tax-exempt statuses (and that he need not amend Ms. Peter's tax returns to delete her deductions concerning her charitable gift annuities in order to have standing to challenge such statuses in this case) stands on much weaker footing than that usually supporting a taxpayer claiming a right to such reliance. In this case, it is the Plaintiff himself -- not a third-party over whom the Plaintiff has no control -- who has challenged the tax-exempt statuses underlying Ms. Peter's prior tax deduction. In other words, it is the Plaintiff and his ward -- not the IRS -- who have taken inconsistent positions concerning the nature of Ms. Peter's annuities as charitable giving. Only Plaintiff -- not the IRS -- has come into court and alleged that what Ms. Peter deducted as a charitable gift to a tax-exempt entity was in fact a purchase of a commercial investment product from an entity that has conspired with others in violation of the federal antitrust laws. Unlike an innocent donor who happens to have given to an entity whose tax-exempt status was later challenged by the IRS, Plaintiff is the sole architect of the judicial determinations he now seeks concerning the Defendants' respective 501(c)(3) statuses. Having accepted a tax benefit

available only because of the tax-exempt status of the issuer of Ms. Peter's annuities, it ill behooves Plaintiff to challenge the foundation of that deduction in this action.[5]

In contrast, none of the Moody Appellants has done anything -- certainly, none of the Moody Appellants has been accused in this lawsuit of doing anything -- that is inconsistent with the 501(c)(3) status of the American Council or that of any of the Defendant issuers of charitable gift annuities. Rather, the Moody Appellants have acted consistently with such status in a manner that Congress has ***unanimously*** approved via the Antitrust Relief Act. Thus, the Moody Appellants are far more entitled than the Plaintiff to rely in their dealings with the other Defendants on the IRS' prior determination of the 501(c)(3) status of each of those Defendants. Accordingly, equity bars Plaintiff from recovering from any of the Moody Appellants in this case as a result of an allegation -- or even as a result of proof -- that one or more of the issuer Defendants is not described in section 501(c)(3) and exempt from taxation under section 501(a).[6]

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[5]Thus, as explained in the Brief of Appellants at 22-23, Plaintiff is estopped from challenging the tax-exempt status of the American Council, the Baptist Foundation of Texas, or the Lutheran Foundation of Texas.

[6]Importantly, there is no reason to conclude, as Plaintiff assumes, that Congress has made Plaintiff the watch dog of charities' compliance with the Internal Revenue Code. As noted in the Brief of Appellants at 23-30, the Antitrust Relief Act codifies Congress' policy decision that, in order to achieve philanthropic goals that Congress deems more important, the "market" for charitable gift annuities will not be price competitive. Indeed, this is the only logical interpretation of Congress' purpose in expressly permitting all issuers of charitable gift annuities collectively to establish a uniform set of rates at which all such issuers may issue charitable gift annuities. Plaintiff's silent assumption that Congress' use of the phrase "persons described in section 501(c)(3) of the Internal Revenue Code . . . that are exempt from taxation under section 501(a) of such Code" to describe the specific issuers entitled to the antitrust exemption was intended to deputize Plaintiff as the IRS' police force finds support neither in the Antitrust Relief Act nor in logic.

III. PLAINTIFF'S RELIANCE ON CAPPER-VOLSTEAD IS MISPLACED.

Plaintiff's effort to avoid dismissal by relying on Capper-Volstead cases also should be rejected. Contrary to Plaintiff's assertion at pages 32-33 of his Brief, there is no generally applicable "rule of forfeiture" providing that an "exempt entity" that conspires with a "non-exempt entity" loses its antitrust immunity. *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S. Ct. 2891, 2902-03

Given Congress' acceptance of a "market" for charitable gift annuities that is devoid of price competition, Plaintiff's suggestion that Ms. Peter was harmed by an agreement among issuers of charitable gift annuities, because a few issuers might have obtained their IRS determination letters improperly, is nonsense. It is not surprising, therefore, that neither the Plaintiff nor the District Court has explained ***how*** the participation of non-501(c)(3) organizations in an otherwise admittedly legal agreement injured Ms. Peter or reduced price competition in the "market" for charitable gift annuities, which Congress has unanimously and unequivocally stated is one in which no price competition is required. Neither the Plaintiff nor the District Court has offered any reason to read the "plain language" of the Antitrust Relief Act to differentiate between rate-setting agreements in which entities erroneously believed to be bona fide 501(c)(3) organizations have participated and rate setting agreements in which they have not. Further, the legislative history demonstrates beyond question that Congress consciously intended the protections of the Antitrust Relief Act to extend to those acting in concert with 501(c)(3) charities to promulgate and publish uniform rates for charitable gift annuities. As noted above, the House Report states that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants, and others . . . when assisting [501(c)(3) entities] in the issuance of a charitable gift annuity or the setting of charitable annuity rates." H.R. Rep. 104-336, 104th Cong. 1st Sess. (1995). The House Report also states that Congress intended the exemption "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." *Id.* There is no logical reason to depart from Congress' clearly expressed, unambiguous intention. Plaintiff's apparent belief that doing so would somehow aid enforcement of the Internal Revenue Code, which otherwise provides no private right of action, certainly is no such reason.

(1993) (the Capper-Volstead Act's "rule about acting in concert with non-exempt parties" is "inapplicable" outside the Capper-Volstead context). Rather, each exemption from the antitrust laws must be examined according to its terms and consistently with antitrust principles. *See Hartford*, 113 S. Ct. at 2901-03 (reasoning that antitrust exemption is not necessarily lost where parties who were entitled to such exemption engaged in concerted conduct with persons to whom exemption arguably did not apply; holding that "it was error for the [Ninth Circuit] to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument," did not satisfy one element of the McCarran-Ferguson exemption).[7]

As demonstrated above, the Moody Appellants are entitled to the immunity granted by the Antitrust Relief Act, because none of the non-501(c)(3) entities with whom they have been accused of conspiring is a competitor for the

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[7]The District Court's citation of the *Hartford* case as support for the proposition that, "if the Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception" is puzzling. In *Hartford*, the Supreme Court unequivocally and unanimously reversed the Ninth Circuit's ruling that "[m]embership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable." *See Hartford*, 113 S. Ct. 2891, 2900-03 (reversing in relevant part *sub nom. In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991)). The *Hartford* Court ruled that the Ninth Circuit erred by relying on inapposite dictum from the *Royal Drug* case, which dictum the Supreme Court held to be inapplicable outside of the context of the Capper-Volstead exemption. *See Hartford*, 113 S. Ct. at 2902-03 (holding that "the rule about acting in concert with nonexempt parties," was "derived from a statute [Capper-Volstead] inapplicable" on the facts of the *Hartford* case). Thus, the holding of the *Hartford* case provides no support for the District Court's conclusion that, "if the [American] Council proves not to be exempt, any Defendant that conspired with the Council to fix the prices or rates of charitable gift annuities would also lose its exemption, even if it has satisfied the prerequisites of the new exception."

issuance of charitable gift annuities.[8] In contrast, in each of Plaintiff's Capper-Volstead cases, the entity whose participation was held to destroy the Capper-Volstead exemption was either an actual or a potential competitor of the participating farmers, planters, ranchers, dairymen, or nut or fruit growers who were otherwise entitled to Capper-Volstead protection. *See, e.g., National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827-29, 98 S. Ct. 2122 (1978) (holding that Congress did not intend to exempt

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[8]Recognizing that none of the non-501(c)(3) entities with whom the Moody Appellants have been accused of conspiring is a competitor of any of the Moody Appellants for the issuance of charitable gift annuities, Plaintiff has attempted to evade Congress' prescription for the dismissal of this case in three ways. First, Plaintiff has alleged that the American Council is not "really" a 501(c)(3) entity. Second, Plaintiff has alleged that at least two issuers of charitable gift annuities that allegedly agreed to use Council rates, the Baptist Foundation of Texas and the Lutheran Foundation of Texas, are not "really" 501(c)(3) entities. Third, Plaintiff has argued that charitable gift annuities compete in the same market with commercial investment products and that various commercial entities that issue commercial annuities and other commercial investment products are parties to the alleged agreement setting rates for charitable gift annuities.

Contrary to the District Court's conclusions, Plaintiff's efforts to stave off dismissal fail as a matter of law. As demonstrated *supra* at 2-8, Plaintiff's first argument fails as a matter of law, because the American Council is not an issuer of charitable gift annuities. As demonstrated *supra* at 8-12, Plaintiff's second argument fails as a matter of law, because the Moody Appellants are entitled to rely on the 501(c)(3) determination letters received by other issuers. Plaintiff's third argument fails as a matter of law, because Plaintiff has no standing to complain of a conspiracy involving commercial investment products. Plaintiff has alleged neither that his ward suffered injury by purchasing commercial investment products at rates that were lower than they would have been in the absence of the alleged participation of such commercial entities in the alleged conspiracy among issuers of charitable gift annuities nor that the participation of such alleged commercial conspirators, who, by statute, cannot issue charitable gift annuities, was a but-for or proximate cause of Ms. Peter receiving a less-than-competitive rate of return on her charitable gift annuities. Thus, Plaintiff has alleged no antitrust injury as a result of the conduct he has pleaded in an effort to circumvent the Antitrust Relief Act.

membership in cooperatives of non-farmers who perform different "economic roles" than farmers); *United States v. Borden Co.*, 308 U.S. 188, 205, 60 S. Ct. 182 (1939) (finding the Capper-Volstead exemption did not protect milk producers who participated in combined attempts of "producers, distributors and their allies" to control the production, distribution, and retail milk markets); *see also Alexander v. National Farmers Org.*, 687 F.2d 1173, 1186 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 938, 939, 103 S. Ct. 2108, 2110 (1983) (noting (1) that *National Broiler* and similar cases address the effect of non-farmer "middlemen's" membership in otherwise exempt cooperatives, and (2) that the Court's conclusion in *National Broiler* that "not even one" non-farmer may belong to a cooperative "cannot be divorced from that Court's emphasis on the economic role of such middlemen and on the intent of Congress not to permit such middlemen to participate in price-fixing"). Accordingly, Plaintiff's Capper-Volstead cases are inapposite.

CONCLUSION

For the reasons stated above, neither the alleged participation of any non-issuer, regardless of its tax-exempt status, nor the alleged participation of any issuer previously determined by the IRS to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) can deprive the Moody Defendants of the immunity from suit granted to the Moody Appellants by the Antitrust Relief Act. Accordingly, the Moody Appellants, whose respective statuses as organizations described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) has not been challenged in this action, are entitled to judgment as a matter of law dismissing Plaintiff's price-fixing claim with prejudice. Therefore, the portion of the District Court's September 30 Order denying Defendants' Motion to Dismiss as to the Moody Appellants, the portion of the District Court's September 30 Order granting Plaintiff leave to file his Fourth Amended Complaint as to the Moody Appellants, and the portion of the District Court's Order

Dismissing Certain Individual Claims and Dismissing Class Claims Against Concordia Lutheran College dated September 30, 1996, granting Plaintiff leave to file a Fifth Amended Complaint as to the Moody Appellants should be reversed.

December 17, 1996 Respectfully submitted,

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LETTER FROM THE HONORABLE JOE KENDALL TO THE HONORABLE W. EUGENE DAVIS, THE HONORABLE JACQUES L. WEINER, JR., AND THE HONORABLE FORTUNATO P. BENAVIDES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
JUDGE JOE KENDALL (214) 767-8343

December 13, 1996

Judge W. Eugene Davis
Judge Jacques L. Weiner, Jr.
Judge Fortunato P. Benavides
U.S. Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: *Richie v. The American Council on Gift Annuities, et al,* Appeal No. 96-11332

I started not to respond to the petition for writ of mandamus, but feel I should on the off chance this Court might be misled as to what is really going on in this case. If histrionics and hyperbole were an art form, what the petitioners have filed would be a Rembrandt. So in the spirit of Paul Harvey, I write with the rest of the story.

On October 15, 1996, the defendants filed an interlocutory appeal which I suggest has patent jurisdictional defects. No mandamus was filed at that time. On November 8, 1996, Judge Benavides set the interlocutory appeal for oral argument. Still no mandamus. On

November 12, 1996, 1 understand that your staff attorneys requested briefing on the jurisdictional issues, recognizing, I presume, the obvious lack of appellate jurisdiction. By now the handwriting was on the wall. Five weeks after the appeal was filed, on November 22, 1996 the mandamus, clearly within this Court's jurisdiction, was finally filed "in the alternative" to the interlocutory appeal. When you cut through all the rhetoric, this mandamus is nothing more than the same interlocutory appeal of the non-final, non-collateral order denying a 12(b)(6) motion that raised the red flag of lack of jurisdiction with the staff attorneys upon initial review. Exaggeration and embellishment were added and the appeal was recast as a mandamus.

Mandamus is an extraordinary remedy. By definition, it should be rarely granted and then only when a legal duty to take some action is apparent and free of doubt. In other words, mandamus should only be granted when reasonable minds could not differ and when failure to take the action sought is a clear abuse of discretion. Simply being wrong is insufficient -- that circumstance is addressed by an old-fashioned appeal after final judgment.

To really make a case for mandamus, it helps to characterize the district judge as some kind of off-the-wall nut who is either too stupid to understand or too lacking in integrity to follow what the law "clearly" is. Such is the case here. As a former advocate I don't take such arguments personally -- I understand everyone is simply doing what they are being paid to do. An examination of facts that were either obfuscated or conveniently ignored by the petitioners will demonstrate, I believe, that this panel is not dealing with some loose cannon that needs bolting down.

To begin with, keep in mind that the order under attack in this mandamus petition is the district court's failure to dismiss this case under Rule 12(b)(6); an action this Court discourages a district court from taking absent exceptional circumstances. The order of September 30, 1996 denying

the defendants' 12(b)(6) motion has been mischaracterized and selectively quoted. In the Charitable Gift Annuity Antitrust Relief Act of 1995 [hereinafter "the Relief Act"], Congress changed the law and exempted certain entities, specifically those which are commonly called "charities," from the Sherman Act. Congress lifted language from the Tax Code to define the exemption:

> (a) EXEMPT CONDUCT. -- Except as provided in subsection (b), it shall not be unlawful under any of the antitrust laws, or under a State law similar to any of the antitrust laws, for 2 or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501 (c)(3)) that are exempt from taxation under section 501(a) of such Code to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

As I thought I made clear in the September 30, 1996 opinion and other orders, the issue wasn't then nor is it now whether a legitimate charity (as Congress chose to define it) is exempt. Certainly a legitimate 501(c)(3) charity is exempt. The issue was and remains whether or not a given defendant in this case meets the test for exemption as set forth in the Relief Act. Petitioners refused to deal with that obvious issue before me and they continue to ignore it before this Court.

The petitioners make much of the fact that the Relief Act was unanimously passed. I was unaware that the vote totals by which a bill was passed is an element of statutory construction of the resulting statute. I was confirmed, unanimously, by the U.S. Senate but I have never considered my judicial pronouncements to be more authoritative as a result. The fact that this is a major argument of petitioners, that the vote by which a bill passes somehow tells us what the statute means is, charitably speaking, a non-sequitur.

Even a cursory analysis reveals that the ramifications of the petitioners' proposed interpretation of the exemption are truly incredible. If petitioners' arguments were accepted, logically *any* antitrust defendant could compel dismissal of an action by *merely claiming* to be a "charity" without presenting any competent summary judgment evidence.

I believe that many of the defendants are legitimate charities, as defined by the exemption language of the Relief Act. The Lutherans, Baptists, and Salvation Army are, I have no doubt, covered. However, as a judge, before I can so find, there must be *some evidence in the record.* Northwestern University did present such evidence, which I will discuss below. I have no idea whether some of the petitioners, such as Hay-Huggins Company, Inc. and Planned Giving Resources, are charities covered by the exemption. I would be very interested to see if two of the petitioners asking you to order me to dismiss the case against them, Gray, Plant, Mooty, Mooty and Bennett, *a Minneapolis law firm*, and Prerau & Teitell, *a New York law firm*, can prove by competent summary judgment evidence that they are "described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) that are exempt from taxation under section 501(a) of such Code."

Northwestern University's motion for summary judgment presented evidence that it is exempt under the Relief Act as I read the exemption. I denied the motion without prejudice because to grant it would have been premature under F.R.Civ.P. 56(f), as this Court has held in *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1487 (5th Cir. 1995) and *Wichita Falls Office Assoc. v. Bank One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993) (reversing the Chief Judge of this district for "pulling out the rug from under" the party seeking such discovery). The plaintiffs at bar had a discovery standstill agreement and had not had an adequate opportunity to take discovery to oppose the motion,

according to their sworn affidavit in opposition to Northwestern's summary judgment motion.

I have attached a representative copy of the orders denying pending summary judgment motions filed by the defendants. They were entered the same day as the order denying dismissal under 12(b)(6) and when read in conjunction with that order, as a whole and not selectively, it is clear that the sky is not falling. I denied the motions without prejudice and put the words "without prejudice" in bold, because the defendants had not asserted the new exemptions under the Relief Act and I wanted to give them a chance to do so. My opinion and order made clear that if a defendant proved by competent summary judgment evidence that it was exempt, it would be dismissed.

I reset the trial months away anticipating that this case may very well go away at the summary judgment stage. Before I could issue a new scheduling order, however, the defendants filed the October appeal that, given my reading of the jurisdictional requirements for an interlocutory appeal, is frivolous. Five weeks later, only after briefing was ordered on the jurisdictional issue, the petition for writ of mandamus was filed.

Petitioners complain that this case is needlessly consuming precious charity dollars. Yet of the 30 volumes and 403 motions, briefs, and letters filed in the district court as of today, roughly 78% have been filed by the defense lawyers. Many are duplicative. Many do nothing to advance the ball. I sought to address this very concern on September 30, 1996 by abating discovery as to everyone except the American Council on Gift Annuities. Yet the paper keeps flowing and the meter keeps running. There are 765 documents filed thus far in the district court and my docket sheet in this case rocks on for 116 pages.

The discovery and briefing necessary to establish in a summary judgment motion that the American Council on

Gift Annuities is, as they claim, a legitimate charity exempt under the Relief Act would cost a fraction of the expense and take a fraction of the legal and judicial time this "appeal" and mandamus has taken *thus far*.

With regard to IRS determination letters, no one has ever said that these would not be probative. However, if Congress had wanted to provide that the granting of an IRS determination letter was the test for exemption they easily could have. Tax exempt status is determined by the Tax Code and one's compliance with its requirements, not solely by an unadjudicated administrative letter based on information supplied by the applicant.

Petitioners claim that the district court is attempting to "assert jurisdiction over the tax system" and "threatens to invalidate tax exempt status." This red herring was addressed in the September 30 opinion. If the district court doesn't have the ability to determine if an entity meets the test for exemption from the Sherman Act provided in the Relief Act, then pray tell who does?

In dicta I wrote that there is an issue of whether an exempt entity conspiring with a nonexempt entity would nevertheless vitiate the exemption. That issue was not squarely before me, but at first blush the plaintiffs' position seemed correct. After reading more cases and further consideration of the arguments I would now say I am not so sure of the plaintiffs' position. (If the mandamus relief requested is denied I would welcome an advisory opinion.)

In any event, what a judge might find at some point in the future, even erroneously, is not something that would call for the extreme measure of a mandamus of dismissal. This is especially so when dealing with issues as to whether other recognized antitrust principles should apply to a new statute and a case of first impression. This is obviously not a legal matter "of which there can be no doubt," as mandamus requires.

On May 3, 1995, I entered partial summary judgment on the state claims. After my ruling the Texas legislature "clarified" (their word, not mine) the law to in essence reverse my ruling. This Court can reverse me on appeal if I am wrong; the Texas legislature cannot.

Although the Texas Supreme Court has not addressed the issue, two state trial courts have opined on the subject, persuasive authority at best. Judge Lowry entered a conclusory opinion devoid of any legal analysis or reasoning. Judge Windle entered an interestingly worded order finding that the legislature had "retroactively changed the law." If his ruling is correct, then mine is correct as well. Otherwise, if I got it wrong on May 3, 1995, there would be no law that needed to be "retroactively changed."

What Judge Windle's opinion does not address and what the legislature very consciously sought to avoid by stating they were merely "clarifying" what the law "had always been" as opposed to "retroactively changing it" is the Open Courts provision of Article 1, Section 13 of the Texas Constitution.

The Attorney General, the state amici and petitioners can't have it both ways. The legislature either *changed* the law and thus raised Texas constitutional problems in attempting to get rid of this suit, or if as they state, they *clarified* the acts of a previous legislature, they are attempting to usurp the third branch's function of judicial review.

With regard to the Texas Attorney General's intervention, once the partial summary judgment was granted (based on then-existing law) the state liability claims were gone and I felt he no longer had a dog in the fight, at least before me, making his requested intervention moot. The Attorney General concedes that if I had let him intervene, he would simply have joined the defendants' motions for summary judgment as to the Texas statutory

claims. There was nothing in his fourteen filings to indicate that he intended to take any legal position different from those of the defendants, so I concluded there was no reasonable basis for a claim that his interests were not adequately represented. This case may need many things, but more lawyers filing more paper is not one of them.

What Is Really Going On Here

If the petitioners' view of statutory construction is correct, then we should have the Fifth Circuit law librarians cancel our subscriptions to U.S. Code and instead acquire the Congressional Record for our law libraries. While I say that with tongue in cheek, what is "law?" Is it statements and views expressed in debate during legislative process, or is law what the statute as enacted plainly says? Is third branch law embodied in written published opinions, or does it (or should it) consist also of arguments made during conference, or made in memos sent back and forth during the judicial process as a Court's decision and opinion takes shape? Should we look to these materials to explain or supplement the plain wording of an opinion to demonstrate what a Court intended?

This case potentially involves a staggering sum of money. Charities are very sympathetic litigants; the plaintiffs are not. This case has generated a significant, well-orchestrated letter, editorial and PR campaign (some directed at me personally). No one, especially an elected politician, is against or will vote against this country's charities and their donors. Lobbyists and lawyers were hired to make this case go away legislatively. In the rush to kill this lawsuit, what they delivered was a statute that, when applied, was not what the lobbyists' clients apparently paid for. They are not going to take the fall because the case did not instantly disappear as they desired, and seek to have the judiciary ignore the plain meaning of the statute.

What was written and passed requires some proof of the stated 501(c)(3) elements for an exemption. This of course indicates some discovery would be appropriate. For some reason (the plaintiffs claim it is fraud) the American Council on Gift Annuities is fighting tooth and nail to prevent any discovery. One wonders why a legitimate charity with nothing to hide would oppose this, particularly when discovery has been abated as to everyone else.

From a personal, pragmatic and selfish standpoint, the granting of a mandamus ordering me to dismiss this case would be a blessing. This black hole of a case sucks up staff and judicial resources like no other case I have ever dealt with. Still, I am convinced that my dismissing or you ordering me to dismiss this case is not appropriate under the law and the record at this time.

Sincerely,

S/Joe Kendall

Joe Kendall
U.S. District Judge

(3) No. 97-309
(2) No. 97-314

Supreme Court, U.S.
FILED
NOV 6 1997
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE AMERICAN BIBLE SOCIETY, et. al.

and

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., individually, and as successor to the Committee on Gift Annuities, an unincorporated association, et. al.,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 5, 1997

3288

QUESTIONS PRESENTED

1. Whether this Court may exercise its discretion to decline to review, under Congress' July 3, 1997 amendment to the Charitable Gift Annuity Antitrust Relief Act of 1995, the Fifth Circuit's April 9, 1997, decision dismissing Petitioners' frivolous appeal of the District Court's denial of Petitioners' motions to dismiss when Petitioners have pending in the District Court a request for the same relief sought in this Court?

2. Whether the Fifth Circuit correctly applied *Behrens v. Pelletier* and *Mitchell v. Forsyth* by holding that the existence of fact issues regarding whether Petitioners have established the elements of an alleged immunity from suit precluded appellate review of the District Court's decision regarding the alleged immunity?

3. Whether the Fifth Circuit clearly abused its discretion under Fed. R. App. P. 38 by imposing sanctions against Petitioners for immediately appealing and seeking mandamus for the District Court's denial their motion to dismiss Respondent's antitrust claims, denial of partial summary judgment on state law claims, and denial of various other interlocutory rulings, when fact issues existed as to the basic applicability of the antitrust exemption claimed and the other rulings fell outside of the collateral order doctrine?

4. Whether the Charitable Gift Annuity Antitrust Relief Act of 1995 created an immediately appealable immunity from suit even though on its face it merely created a defense to liability and nothing in the legislative history indicated that the statute created an immunity from suit?

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Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated ("Respondent" or "Plaintiff") opposes Defendants' petitions for certiorari. Nothing about this appeal merits review by this Court on petition for writ of certiorari, and no reason exists for vacating and remanding the case to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-23a) is reported at 110 F.3d 1082. The opinion of the District Court (Pet. App. 24a-37a) is reported at 943 F. Supp. 685. Petitioners also appealed the denial of summary judgment on issues covered in an earlier opinion of the District Court: *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

STATEMENT OF THE CASE

Petitioners omit or discount significant aspects of the procedural history of this case that reveal the "uncertworthy" nature of this appeal and provide additional reasons supporting the Fifth Circuit's dismissal of Petitioners' appeals and sanctions award. Most importantly, the District Court is currently addressing the 1997 amendments to the Charitable Gift Annuity Antitrust Relief Act of 1995[1] by way of motions to dismiss or for judgment on the pleadings. Briefing has closed, and Respondent expects a ruling soon. Additionally, Petitioners state

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[1]In this Brief In Opposition, the phrases "Antitrust Relief Act" or "Act" refer to the 1995 version of this law, and the phrases "Amended Antitrust Relief Act" or "Amended Act" refer to the law as amended in 1997.

that the Fifth Circuit sanctioned them for appealing the District Court's refusal to dismiss the antitrust claims. But Petitioners frivolously appealed many different rulings of the District Court in their appeal to the Fifth Circuit and even invoked the more stringent mandamus jurisdiction of that court in the same Quixotic endeavor. In addition to the existence of fact issues regarding the application of the Antitrust Relief Act, Petitioners' entire conduct provided an alternative justification for sanctions.

A. THE LAWSUIT

Plaintiff brought this lawsuit in December 1994 to redress numerous wrongs. Specifically, Plaintiff initially alleged that: (1) Petitioners had conspired with each other to fix the rates of return on certain fixed-income products marketed by Petitioners as investments; (2) certain Petitioners had knowingly sold annuities in Texas when the state Insurance Commission had told them that their conduct was illegal; (3) certain Petitioners also operated trust businesses and managed money for the general public when the State Banking Commission had told them that was also illegal; and (4) certain Defendants had committed numerous breaches of fiduciary duty against Plaintiff.

On March 14, 1995, the district court denied a motion to dismiss asserting that Defendants' challenged activities did not constitute trade or commerce under the Sherman Act. On May 3, 1995, the trial court granted partial summary judgment as to one Defendant's illegal sale of annuities and money management services to Plaintiff. *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

B. THE INTERVENING LEGISLATION.

Subsequently, Defendants successfully lobbied for changes in applicable federal and state law. Congress passed the Antitrust Relief Act, which created an antitrust exemption for certain conduct by certain entities. The new statute made no mention of creating an immunity from suit, but rather provided a substantive defense on the merits to those who could meet its terms. Specifically, it provided:

> [I]t shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) . . . that are exempt from taxation under section 501(a) . . . to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

Defendants also pushed through Texas legislation purportedly authorizing nonprofit organizations to sell annuities without being licensed to sell insurance and to operate trust businesses for the general public without being organized as trust companies. TEX. BANKING CODE ANN. art. 342-1113(3); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Texas Non-Profit Corporations Act); TEX. INS. CODE ANN. art. 1.14-1A § 2(a) and (b). Like the federal statute, the state statutes contained no mention of immunity from suit. Instead, they granted authority to engage in certain otherwise prohibited transactions and activities.

As a result of the new federal and state legislation, Defendants filed various motions to dismiss or for summary

judgment. Plaintiff opposed these motions and sought leave to amend his complaint to assert that Defendants were engaging in illegal activities that were outside the coverage of the new laws. In the face of the Antitrust Relief Act, Plaintiff alleged that the American Council on Gift Annuities, Inc. (the "Council") and others were not bona fide § 501(c)(3) entities and that the Council also procured its determination letter by fraud, which was aided and abetted by the other Defendants. Plaintiff further alleged that an illegal agreement between persons *not* described in § 501(c)(3) and not tax-exempt under § 501(a) with respect to CGAs *and* other life income products precluded application of the Act to this case. (Pet. App. at 49a-81a)

C. DEFENDANTS' FRIVOLOUS APPEALS TO THE FIFTH CIRCUIT.

This activity culminated when the district court issued a Memorandum Opinion and Order (the "Memorandum Opinion") (Pet. App. at 24a) in response to numerous motions to dismiss and for summary judgment or partial summary judgment. The court:

1. denied Defendant Lutheran Foundation of Texas's October 26, 1995, Motion to Reconsider the May 3, 1995, Order Granting Partial Summary Judgment;
2. denied Defendant American Council on Gift Annuities' and Defendant Lutheran Church Missouri Synod's ("LCMS") November 22, 1995, Motion for Partial Summary Judgment on Texas Statutory Claims;

3. denied Defendants' December 14, 1995, Motion to Dismiss based on the Antitrust Relief Act;
4. denied Defendant Northwestern University's Motion for Summary Judgment on the Antitrust Relief Act filed January 26, 1996;
5. granted Plaintiff's February 13, 1996, Motion for Leave to File Fourth Amended Class Action Complaint;
6. denied Defendants' August 27, 1996, Renewed Motion for Relief based on the above motions; and
7. abated all discovery except that pertinent to whether the Council was entitled to the new antitrust exemption.

In different permutations, Defendants appealed ruling numbers (2) - (6) of the Memorandum Opinion. Petitioners filed three separate notices of appeal. Twenty-nine Defendants, led by the Council, filed one (the "Council Notice"). Three Defendants, the American Bible Society, the American Leprosy Missions, and the Moody Bible Institute of Chicago jointly filed a separate notice (the "Moody Notice"), and Northwestern University ("Northwestern"), despite also joining the Council Notice, filed a separate notice. All Defendants appealed the denial of their motion to dismiss based on the Antitrust Relief Act. The Council Notice also appealed the denial of the motion for partial summary judgment on state law claims (no. 2) filed by the Council and LCMS—including the appeal of 27 Defendants who were unaffected by that ruling—and also

appealed the denial of the "Renewed Motion for Relief" (no. 6). Those 29 Defendants, plus the Moody Notice Petitioners, also appealed the Court's grant of leave to amend to file the Fourth Amended Class Action Complaint (no. 5). Finally, Northwestern filed a notice of appeal concerning the motion to dismiss (no. 3) and its own motion for partial summary judgment (no. 4).

All Petitioners joined the same Statement of Jurisdiction predicating jurisdiction on 28 U.S.C. § 1291. Invoking the rare "collateral order doctrine," Defendants stated that jurisdiction existed because the order denying their motion to dismiss based on the Antitrust Relief Act (no. 3) and the trial court's permitting the pleading amendment (no. 5) satisfied the three elements of the collateral order doctrine. Petitioners sought to equate the District Court's ruling regarding the Antitrust Relief Act with an immunity from suit. This claim was particularly surprising because nowhere in their briefing on these issues before the District Court had Petitioners asserted that the Antitrust Relief Act was an immunity as opposed to an ordinary defense on the merits. Additionally, Petitioners' Statement of Jurisdiction, however, offered no basis for jurisdiction over the denial of the so-called Renewed Motion for Relief (no. 6), the motions for partial summary judgment on state law claims filed by the Council and the LCMS (no. 2), or Northwestern's partial summary judgment motion (no. 4).

Thus, although Defendants purported to appeal rulings nos. 2, 3, 4, 5, and 6, the Statement of Jurisdiction alleged

jurisdiction only as to rulings nos. 3 and 5.[2] Also without an asserted jurisdictional basis were Defendants' efforts to raise as a group the district court's March 14, 1995 denial of three (and only three) Defendants' motion to dismiss that occurred *eighteen months* prior to the filing of the notice of appeal.[3]

In addition to attempting to invoke appellate jurisdiction, Petitioners sought mandamus in the Fifth Circuit attacking the same rulings that were at issue in the direct appeal. Yet, as the Fifth Circuit correctly held, none of the rulings approached the type of trial court abuse justifying such an extreme measure.

In sum, Defendants' invocation of the Fifth Circuit's appellate jurisdiction based on the collateral order doctrine and pendent jurisdiction was frivolous as was their attempt to seek mandamus. Even on the one jurisdictional basis they attempted to justify—the applicability of the collateral order doctrine to the district court's denial of the Antitrust Relief Act motion to dismiss—they failed to provide a meaningful basis for appeal. Accordingly, the Fifth Circuit properly sanctioned Petitioners and dismissed the appeals in their entirety.

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[2]Later in their Appellants' Brief, Petitioners weakly asserted that their appellate point about the motions for partial summary judgment on state law (no. 2) "arguably" fell within the Fifth Circuit's "*Cohen* jurisdiction, either as the equivalent of a qualified immunity under *Martin* or as with the Court's pendent jurisdiction."

[3]In denying this motion to dismiss, the District Court properly found that charitable gift annuities constituted trade or commerce within the meaning of the Sherman Act.

REASONS FOR DENYING THE PETITION

The Fifth Circuit properly dismissed this ill-conceived appeal for lack of jurisdiction and imposed sanctions on Petitioners. Yet, Petitioners ask this Court to grant certiorari in order to reverse the Fifth Circuit's construction of the Antitrust Relief Act on which the dismissal and sanctions were based. But the present case does not merit granting certiorari because it presents neither a conflict of federal law nor an important jurisprudential issue. Additionally, this Court should not grant certiorari, vacate, and remand these interlocutory appeals because the District Court is currently considering motions to dismiss based upon the Amended Antitrust Relief Act. Moreover, even if the Court were inclined to do so, it should leave untouched the Fifth Circuit's award of sanctions as the Amended Antitrust Relief Act has no bearing on that correct ruling.

A. THIS CASE PRESENTS NO CONFLICT AND INVOLVES NO ISSUE OF JURISPRUDENTIAL IMPORTANCE.

Petitioners do not contend that this case presents a conflict with a decision of any other court of appeals, but they do incorrectly contend that the Fifth Circuits' ruling conflicts with this Court's holdings in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Petitioners assert that the Fifth Circuit erroneously found that fact issues precluded their interlocutory appeal when, in fact, they claim to have been raising purely legal issues. Petitioners argue that the legal issue of whether the Antitrust Relief Act authorized "hybrid" conspiracies preceded any factual inquiries.

But that view fails to "come to grips" with the plain language of the statute. Regardless of who was involved in the conspiracy, the statute only applied to persons "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26 ... ." Thus, the Fifth Circuit was correct and consistent with *Behrens v. Pelletier* and *Mitchell v. Forsyth* when it said, "[e]ven were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501 (c)(3) determinations are factual." (Pet. App. at 11a n. 11 (citations omitted)). Petitioners assert that if hybrid conspiracies were legalized by the Act, then their status as a § 501(c)(3) organization would be immaterial, but this is not so. In order to avail themselves of any purported immunity created by the Act, Petitioners had to factually meet the terms of the statute and that is precisely what Respondent had challenged in the District Court. As the Fifth Circuit and District Court stated, Respondent "stated a claim as to the defendants he claims are non-exempt." (Pet. App. at 9a) As a result, the Fifth Circuit's ruling is consistent with this Court's precedent.

The present case presents no issue of broad public importance or a jurisprudential matter calling for the supervision of this Court. Petitioners apparently seek to have this Court review the Fifth Circuit's decision under either the Antitrust Relief Act as it existed at the time of the opinion or under its subsequent amendment. Yet, any ruling on the version Antitrust Relief Act construed by the Fifth Circuit will have no

significance now. Respondent knows of no other pending case that could arguably involve construction of the Antitrust Relief Act as it existed prior to July 3, 1997. And since the statute has been amended, the issues raised and ruled upon by the Fifth Circuit will not be before any court again. Similarly, Respondent knows of no other cases involving the application of the Amended Antitrust Relief Act.

B. THE UNIQUE PROCEDURAL POSTURE OF THIS CASE RENDERS IT UNSUITABLE FOR CERTIORARI REVIEW.

The Court should refuse to grant certiorari in this case because its unique posture renders it an unsuitable case for certiorari review. Petitioners seek certiorari review based upon a statute that has not been appropriately addressed by any lower courts in this case. The application of the 1997 amendments to the Antitrust Relief Act was not, and could not have been, raised below. *C.f., Gray v. Netherland*, 116 S.Ct. 2074 (1996) ("If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it."); *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531 (1992) (same). Moreover, Petitioners' attempt to use *United States v. Peggy Schooner*, 1 Cranch 103, 2 L. Ed. 49 (1801), to require application of the Amended Act in this Court is misplaced in light of the Court's practice of granting certiorari, vacating, and remanding in cases in which the law changes. In fact, the Petitioners have filed motions to dismiss this case in the District Court on which a ruling is expected soon. Given that the present appeal is merely an interlocutory appeal with a shaky jurisdictional basis anyhow, a proper respect for the roles of

both this Court and those of the lower federal courts militates in favor of not granting certiorari and allowing the parties to address the new issues raised by the Amended Antitrust Relief Act through the District Court first.

C. THE FIFTH CIRCUIT PROPERLY SANCTIONED PETITIONERS.

Petitioners claim that the Fifth Circuit abused its discretion in sanctioning them for their frivolous appeals. But the Court properly awarded Plaintiff less than fifteen percent of its costs and fees involved in responding to these appeals under FED. R. APP. P. 38. It properly found, based on applicable Fifth Circuit caselaw, that Petitioners' were pursuing "legal points not arguable on the merits" or points "in which the result [was] obvious." (Pet. App. at 21a (citing *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985); *Coghlan v. Starkey*, 852 F.2d 806, 810 (5th Cir. 1988)). Specifically, as noted in part A. above, the Fifth Circuit correctly found that fact issues precluded jurisdiction in the court of appeals. As a result, it sanctioned Petitioners in the amount of $15,000.00—which was just over ten percent of the attorney's fees and cost that Respondent estimated had been incurred in defending against Defendants' frivolous appeals.[4]

Contrary to Petitioners arguments, nothing in the Amended Act alters appropriateness of sanctions in this case.

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[4]At oral argument, the Fifth Circuit requested that Plaintiff submit a summary of its attorney time and expenses for use by the court in assessing possible sanctions. At that time, Respondent's attorneys had incurred approximately $125,000.00 in attorney's fees and expenses responding to Petitioners' ill-fated appeal.

The Amended Act does not change the standard for imposing sanctions used by the Fifth Circuit—frivolity. If anything, the Amended Act evidences additional reasons for imposing sanctions—that no immunity from suit appeared on the face of the Antitrust Relief Act.

In short, the Fifth Circuit's ruling was not only justified, but required by the blatant disregard shown by Petitioners for a number of applicable standards. In fact, even if the Fifth Circuit's rationale for sanctions regarding fact issues was wrong, that court reached the correct result.

1. Numerous Frivolously Appealed Rulings in Addition to those Regarding the Antitrust Relief Act Support the Sanctions.

Petitioners ignore the procedural history of this case to argue that if the Fifth Circuit was incorrect on the Antitrust Relief Act, then no sanctions were proper. But a look at all of the different potential reasons for imposing sanctions reveals the merit in the award. In the Fifth Circuit, Plaintiff moved to dismiss Defendants' appeals in their entirety on every issue because none of the rulings appealed were final judgments or collateral orders under 28 U.S.C. § 1291. Plaintiff also sought dismissal of attempted appeals from rulings that preceded the District Court's Memorandum Opinion by over eighteen months; attempted appeals of partial summary judgments against certain defendants on state law issues; and attempted appeals of rulings on issues in which almost all Defendants failed to join. In addition, Petitioners brought a meritless mandamus action. A cursory reading of the Fifth Circuit's opinion reveals its

frustration at the unnecessary filings of Defendants in addition to failing to recognize the factual disputes preventing interlocutory appeal. These various actions justified sanctions.

2. The Fifth Circuit Properly Sanctioned Petitioners Because the Antitrust Relief Act Created No Plausible Basis for Finding an Immediately Appealable Immunity From Suit.

Yet, the most important additional ground on which the Fifth Circuit could have sanctioned Petitioners was its attempt create an immunity from suit out of the Antitrust Relief Act. Nothing in the language or legislative history of the statute upon which Petitioners relied in the Fifth Circuit even remotely hinted that Defendants were granted any kind of extraordinary immunity from suit. Moreover, nothing in the District Court's rulings was effectively unreviewable on appeal; conclusively determined anything; or was completely separate from what Plaintiff must prove to prevail on the merits.

The Fifth Circuit clearly lacked jurisdiction because the district court's rulings did not meet each of the three elements of the collateral order doctrine. First, Defendants asserted that the rulings were "effectively unreviewable" on appeal after trial because the Act "effectively 'confers an immunity from suit.'" The Act, however, simply created a defense to liability, not an immunity from suit, and as such was not immediately appealable. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 2003 (1994).

The plain terms of the Act made no reference to any kind of immunity. Defendants' assertion was, in essence, that

they were not subject to a claim upon which relief can be granted, and such assertions could not be immediately appealable. *Digital Equip. Corp.*, 114 S.Ct. at 1998. The Antitrust Relief Act, unlike the 1997 amendments, created only a substantive rule of decision on the merits. As such, early disposition of the case was the natural benefit of satisfying the elements of the statute and not an immunity from suit.

In the absence of express statutory language creating an immunity from suit, immunities from suit are predicated upon deeply rooted and fundamental Constitutional or other interests that can only be protected if there is immunity from suit. *Id.* No such interests existed in this case. Defendants only pointed to *freedom from the burdens of litigation* as the basis for their claim of immunity. Such an interest was not enough, as a matter of law. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).

The district court's rulings also did not conclusively establish anything in this case. The District Court expressly stated an intention to revisit its rulings. Hence, they were not appealable. *Swint v. Chambers County Comm'n*, 115 S.Ct. 1203, 1208 (1995). Finally, the district court's rulings involved questions of conspiracy and fraud inextricably tied to the merits of the case, and as such were not appealable. *Johnson v. Jones*, 115 S.Ct. 2151, 2157 (1995). Accordingly, the collateral order doctrine did not apply, and could not provide a colorable basis for appellate jurisdiction.

D. GRANTING WRIT, VACATING, AND REMANDING IS NOT JUSTIFIED IN THIS INTERLOCUTORY APPEAL.

While the Court does occasionally grant certiorari, vacate, and remand for consideration of changes in the law, those cases typically to do not involve interlocutory appeals such as this in which the parties have ready access review of the changed law by pursuing relief in the District Court. In these instances, the Court should not exercise its discretion to grant certiorari, vacate, and remand. The Court should not use its limited resources on an issue that has not been addressed by any of the lower courts. Here, the District Court is already considering the application of the new law by way of Petitioners renewed motions to dismiss and for judgment on the pleadings. Briefing is complete, and Defendants certainly will test the decision by appellate review should their pending motions be denied. Respondent anticipates that the District Court will rule soon.

Even if the Court were inclined to grant certiorari, vacate, and remand, it should not do so with respect to the award of sanctions by the Fifth Circuit. As noted above, the award was justified for many reasons, and nothing in the Amended Antitrust Relief Act changes the analysis to be applied in assessing appellate sanctions.

CONCLUSION

For these reasons, the Petitions for Writ of Certiorari should be denied.

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(4)

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No. 97-309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE AMERICAN BIBLE SOCIETY, *et al.*,
Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ARGUMENT

In his Brief in Opposition, Respondent Boyd L. Richie asserts that this case does not merit review on writ of certiorari because the District Court can be relied upon to apply the 1997 version of the Charitable Gift Annuity Antitrust Relief Act, because fact issues precluded Petitioners' appeal, and because reasons not relied upon by the Fifth Circuit in its published opinion justify the imposition of sanctions. Petitioners respectfully submit this reply brief to address Respondent's arguments.

A. The Fifth Circuit's Application of the Antitrust Relief Act Warrants Review on Certiorari.

Respondent recognizes that granting the writ and vacating the decision below would be consistent with this Court's practice "in cases in which the law changes." Brief in Opposition at 10. Nevertheless, Respondent urges the Court to deny the writ because this "case presents no issue of broad public importance" and "the parties have ready access to review of the changed law by pursuing relief in the District Court." *Id.* at 9, 15. These arguments miss the point.

Contrary to Respondent's suggestion, this is not a case in which the law merely "changed." This is a case in which Congress, having read the Fifth Circuit's misinterpretation of a 1995 statute designed to save the nation's charities from the misapplication of the antitrust laws, unanimously enacted new statutory language "drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). In this very unusual case, the decision to be reviewed in light of new legislation was the ***cause*** of the new statute. In light of this peculiar causal relationship and the Court's oft-stated "obligation . . . to give effect to Congress' latest enactment," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211,

115 S. Ct. 1447, 1457 (1995), denying the writ and allowing the Fifth Circuit's decision to stand would be an affront to Congress.

In addition, allowing the Fifth Circuit's decision to stand would undermine this Court's efforts to establish coherent rules of statutory interpretation. Importantly, this is not a case in which the Court of Appeals merely erred in discerning the will of Congress. Rather, this is a case in which the courts below, apparently offended by Congress' effort to affect the result in a case *sub judice*, seemed determined to frustrate Congress' exercise of its constitutional prerogatives to amend the antitrust laws and to make such amendments apply to pending cases. Indeed, the apparent failure of the courts below to question what they held to be the "plain meaning" of the 1995 Act in view of the Act's legislative history and manifest purpose suggests that those courts actually employed their "plain meaning" analysis as a substitute for -- rather than a method of discerning -- legislative intent.

Although this Court previously has cautioned that the "plain meaning" analysis is more "'an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists,'" *Watt v. Alaska*, 451 U.S. 259, 265, 266 (1981) (citation omitted), that warning appears to have provided insufficient guidance to the Fifth Circuit in interpreting the 1995 Act. Thus, Respondent misses the mark when he suggests that the absence of other cases involving the Antitrust Relief Act diminishes the public and jurisprudential importance of this case. In truth, correcting the Fifth Circuit's misguided "plain meaning" analysis is a matter of substantial public and jurisprudential import. Indeed, the rule that should emerge from this case is not simply that Petitioners are immune from Respondent's antitrust claims, but rather that courts "have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers." *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (footnote omitted). Accordingly, this Court should grant the writ and

reaffirm that, "[w]here congressional intent is discernible," courts "must give effect to that intent." *Id.*

Contrary to Respondent's contentions, the proceedings in the District Court do not diminish the need for review. First, as stated in the Petition at 10 n.2, the District Court lacks this Court's authority and responsibility to correct the Fifth Circuit's errors. Second, it is far from clear that the ongoing proceedings in the District Court would expeditiously dispose of this action.

Like his submission in this Court, Respondent's response to Petitioners' motions to dismiss in the District Court stops short of conceding that the 1997 Act requires dismissal of his antitrust claims. Describing dismissal under the 1997 Act as "problematic," Respondent has attempted once again to persuade the District Court to ignore the will of Congress:

> Congress has passed a new statute that Defendants rely upon to dismiss Plaintiff's antitrust claims. That statute, however, relegates people to administrative remedies before the IRS that do not yet exist and indicates that Congress has not finally spoken on the subject matter of this lawsuit. Congress directed the Attorney General to study the new statute and report back to Congress on its anticompetitive effects and to recommend any amendments to the law. Previously, Defendants had argued that their earlier statute was a chameleon that could take on any meaning necessary to defeat Plaintiff's claims. Defendants are again relying on a shifting sands approach when they ask the Court to dismiss this case on the basis of a law that even Congress has said is not finished. Dismissal of this action is problematic so long as administrative remedies may conceivably be pursued and the status of the law is unclear.

Plaintiff's Response to Motions to Dismiss and Similar Motions at 2 (filed Sept. 15, 1997).[1]

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[1]Respondent's contempt for Congress' exercise of its prerogative

In light of Respondent's refusal to concede defeat under the 1997 Act, a denial of certiorari might well require further proceedings in the Court of Appeals. To avoid that result and to spare Petitioners from the burden of further proceedings below, this Court should grant the writ and reverse the Fifth Circuit's interpretation of the Antitrust Relief Act under the rule of *Schooner Peggy*. By granting the writ, vacating the Fifth Circuit's misapplication of the "plain meaning" rule, and ordering the dismissal of Respondent's antitrust claim under the 1997 Act, this Court can ensure the development of coherent rules of statutory interpretation

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to immunize Petitioners is evident in his argument to the District Court:

> Th[is] lawsuit shocked those in "Big Charity" who had come to see themselves as above the law. Defendants' contempt for the law was soon made manifest in numerous court filings that professed the view that Defendants were not only beyond the law, but were beyond the reach of this Court to determine whether or not they were.
>
> It soon became apparent to the Defendants that this Court did not share that view. Ultimately, neither did the Fifth Circuit. Defendants have not prevailed on a single substantive motion in this entire proceeding. Although it should have been obvious that their arrogance had led them to break the law and squeeze money out of vulnerable old people, Defendants showed no sign of contrition for the harm they had caused. Instead, they flexed their impressive muscle and bought and paid for a free pass from Congress. Thanks to Congress, Defendants have been given wide latitude to mislead, coerce, and trick millions more people into funding Defendants' opulent offices, their officials' high salaries, their incessant lobbying, and numerous other indulgences that have been well documented as characterizing the activities of "Big Charity." Under the new law, the strong may oppress the weak at will. While one may cling to the notion that might does not make it right, it appears that might can get one off the hook.

Plaintiff's Response to Motions to Dismiss and Similar Motions at 1-2 (filed Sept. 15, 1997) (footnote omitted).

and achieve Congress' intention to save charities from the burden and expense of this pernicious lawsuit.

B. The Fifth Circuit's Jurisdictional Error Warrants Review on Certiorari.

Respondent's contention that the Fifth Circuit's dismissal of Petitioners' appeal does not conflict with this Court's holdings in *Behrens* and *Mitchell* or otherwise justify review on writ of certiorari rests upon a profound misapprehension of Petitioners' argument. In particular, Respondent's argument at page 9 of his Brief in Opposition that fact issues precluded Petitioners' appeal under the collateral-order doctrine because "Petitioners had to factually meet the terms of the statute" ignores Petitioners' argument on appeal that Respondent bore the burden to plead and prove that Petitioners' conduct fell outside the scope of the immunity afforded by the 1995 Act.

In Petitioners' view, the 1995 version of the Act immunized from price-fixing claims the issuance of charitable gift annuities by recognized 501(c)(3) entities listed as such in the IRS' Publication 78. Beginning from that premise, Petitioners have argued consistently with this Court's *Noerr-Pennington* jurisprudence that a plaintiff seeking to base price-fixing liability on Petitioners' immunized conduct of issuing charitable gift annuities bore the burden to plead and prove conduct falling outside the exemption conferred by the 1995 Act. *See* Pet. App. at 95a n.4; *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60-61 (1993) (holding that plaintiff who seeks to base antitrust liability on defendant's immunized conduct of bringing lawsuit must plead and prove that allegedly sham lawsuit was both objectively meritless and subjectively brought in bad faith). Thus, Petitioners have argued that Respondent bore the burden to plead and prove as part of his *prima facie* case that Petitioners' alleged rate-setting conduct fell outside the scope of the immunity conferred by the 1995 Act. *Id.*

Indeed, Respondent attempted to carry such a pleading burden by alleging that some of the Defendants who were listed in Publication 78 had obtained their 501(c)(3) statuses improperly and that various attorneys, actuaries, and commercial entities who were neither "described in section 501(c)(3) of title 26" nor "exempt from taxation under section 501(a) of title 26" had participated in an alleged rate-setting agreement involving Petitioners.

In Petitioners' view, Respondent's allegations did not satisfy his burden to plead conduct falling outside the 1995 Act, because Congress did not intend the 1995 Act's reference to "persons described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" to establish a factual element of the immunity afforded by the Act. Rather, as noted above, Petitioners contend that the 1995 Act immunized from price-fixing claims all agreements establishing rates of return for charitable gift annuities issued by entities recognized by the IRS to be 501(c)(3) organizations, regardless of the alleged participation of non-501(c)(3) entities in such rate-setting agreements. *See* Petition at 5-6, 21-27.

Respondent's contention that a fact issue precluded Petitioners' appeal because "Petitioners had to factually meet the terms of the statute" is nothing more or less than a misguided assertion that Petitioners should have lost on the merits of their argument that they bore no burden to plead or prove the applicability of the 1995 Act. Accordingly, that assertion should not deter this Court from reviewing the Fifth Circuit's jurisdictional holding in this case.[2]

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[2]A recent case demonstrating the proper analysis of appeals from orders denying motions to dismiss private antitrust claims on immunity grounds is *Jordan v. Avco Financial Services of Georgia, Inc.*, 117 F.3d 1254 (11th Cir. 1997), in which the Eleventh Circuit properly recognized that its appellate jurisdiction under the collateral-order doctrine turned on whether the McCarran-Ferguson Act provided an immunity from suit and not on whether the plaintiffs' claims in that particular case fell within the scope of any such immunity. *See* 117 F.3d at 1256-58. In this case, the Fifth Circuit specifically reserved decision on the question

C. The Fifth Circuit's Imposition of Sanctions Warrants Review on Certiorari.

The contentions in Respondent's Brief in Opposition similarly should not deter this Court from granting certiorari to review the Fifth Circuit's imposition of sanctions.

First, Petitioners did nothing in perfecting or prosecuting their appeals that could justify an award of appellate sanctions in this case of first impression under the Antitrust Relief Act.[3] Second, and more importantly, the decision to grant certiorari should not turn on whether the Fifth Circuit could have imposed sanctions based on conduct the court declined to discuss in its opinion.

Because this Court sits more to ensure uniformity of results across cases than to correct erroneous decisions in particular cases, this Court's decision whether to grant discretionary review should turn in large part on the precedential effect of the decision to be reviewed. That precedential effect, of course, is based on what the lower court stated in its opinion. Accordingly, this Court's decision whether to review the Fifth Circuit's imposition of sanctions should turn on the precedential effect of what the Fifth

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whether the 1995 version of the Antitrust Relief Act conferred an immunity from suit. Pet. App. at 9a.

[3]Respondent's contention that sanctions could have been imposed because Petitioners appealed too many of the District Court's rulings is meritless. Although this Court's decision in *Swint v. Chambers County Commission*, 115 S.Ct. 1203 (1995), renounced the doctrine of pendent-party appellate jurisdiction, the *Swint* decision left open the possibility of pendent-issue appellate jurisdiction of issues inextricably intertwined with an issue that is immediately appealable under the collateral-order doctrine, *see id.* at 1212. In this case, some of the Petitioners appealed only the District Court's denial of their motion to dismiss and its related decision to allow Respondent to file the amended complaint that raised the purported fact issues on which the District Court relied to deny the motion to dismiss. *See* Respondent's Brief in Opposition at 5-6. Under *Swint*, appealing the inextricably intertwined order granting leave to amend clearly was not sanctionable.

Circuit actually held, as reflected in the precedent-setting opinion the Fifth Circuit actually issued. Indeed, little is less relevant to this Court's exercise of its certiorari jurisdiction than Respondent's assertion that the Fifth Circuit could have imposed sanctions based on conduct that the Fifth Circuit failed to discuss in its opinion.

Later courts will have only the Fifth Circuit's opinion to inform their discretion under FED. R. APP. 38. Respondent's recitation of Petitioners' other alleged infractions will not be available to later courts faced with the task of applying the Fifth Circuit's decision in this case to subsequent appeals. Thus, this Court should grant certiorari to review the Fifth Circuit's imposition of sanctions unless the Court is satisfied that the Fifth Circuit's opinion -- unaccompanied by Respondent's additional allegations -- properly applies an appropriate standard for imposing sanctions in cases of first impression.

Petitioners respectfully submit that the Fifth Circuit's opinion applies no such standard. Indeed, the Fifth Circuit's imposition of sanctions in this case of first impression conflicts with this Court's decision in *McKnight v. General Motors Corp.*, 114 S.Ct. 1826 (1994), which held that an appeal, even if not meritorious, was not sanctionable where "this Court had not yet ruled on" the question presented. It also conflicts with a number of decisions of the Courts of Appeals, including prior decisions of the Fifth Circuit. *See, e.g., Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213 (6th Cir. 1997) (holding that appellate sanctions were inappropriate where "central issue was one of first impression"); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993) ("Sanctions are inappropriate if the issue is one of first impression."); *Stebco, Inc. v. United States*, 916 F.2d 556, 558 (9th Cir. 1990) ("Because the reviewability of a district court's decision regarding venue in a §7429 proceeding is a question of first impression in this circuit, the government's attempt to appeal is not sanctionable conduct."); *Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 854 n. 5 (11th Cir. 1989)

(declining to impose sanctions where "appeal present[ed] an issue of first impression in this circuit"); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 749, 761 (1st Cir. 1988) (where appeal presented "important issues of first impression" in First Circuit, sanctions were "inappropriate"); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("Given the previously unresolved state of the law in this Circuit concerning the question of appellate jurisdiction in consolidated actions, it would be improper to award sanctions against a party whose appeal raise[d] the issue for the first time."); *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 794 (7th Cir. 1983) (holding that appeal was not frivolous where issues "had never previously been litigated under the Interstate Commerce Act"); *Asai v. Castillo*, 593 F.2d 1222, 1225 (D.C. Cir. 1978) (declining to impose sanctions where D.C. Circuit "had not previously addressed" issue presented by appeal). Thus, the Fifth Circuit's award of sanctions clearly warrants review in this Court.

CONCLUSION

For the reasons stated above and in their Petition for Writ of Certiorari, Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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